18-99

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~404.~~ 424

BRANCH T. MASTERSON, ASSIGNEE IN BANKRUPTCY OF JOHN H. HERNDON, BANKRUPT, ET AL., APPELLANTS.

vs.

VOLNEY E. HOWARD ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED NOVEMBER 24, 1871.

Oct Term 1895

Institutes
of
Hindu

164

Dream for completion
Date June 1866. Pachmarhi
1. Dream telling about Emmie
Lefroy about Mrs Lee.

2 Dream during Easter Christ
became it was found on the 16th
Sorrow - which is why we take
Forgiveness [illegible] Mrs Lee
to be a martyr

Calendar of mine Mrs Lee
Pachmarhi reminded me to add
first part Some dream not appended
that will must be dreamed

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA:

BRANCH T. MASTERSON, ASSIGNEE IN B'K'TCY of John H. Herndon, bankrupt, and Mary A. Maverick, surviving wife of Sam'l A. Maverick, dec'd, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, heirs-at-law of Sam'l A. Maverick, dec'd, appellants,

vs.

VOLNEY E. HOWARD, RICHARD A. HOWARD, Russell Howard, Thomas H. Bennett, Caroline H. Bennett, E. H. Lombard, Julia A. Lombard, and Mehitabel Howard, heirs at-law of Bainbridge D. Howard, dec'd, appellees.

The President of the United States to Volney E. Howard, Richard A Howard, Russell Howard, Thomas H. Bennett, Caroline H. Bennett E. H. Lombard, Julia A. Lombard, and Mehitabel Howard, heirs-at-law of Bainbridge D. Howard, dec'd, and Howard & Harrison, and George F. Moore, their solicitors:

You are hereby cited and admonished to appear at the next term of the Supreme Court of the United States to be held at Washington, on the first Monday of December next, to show cause, if any there be, why the decree rendered in your favor by the circuit court of the United States for the western district of Texas, in a certain suit or cause therein, formerly depending between you as complainants and John H. Herndon, Sam'l A. Maverick, and others, who were defendants,
1½ numbered 10 upon the chancery docket of said court, at Austin, should not be reversed and speedy justice be done to the parties in that behalf, in pursuance of an appeal obtained by the said Branch T. Masterson, assignee in bankruptcy of John H. Herndon, and Mary A. Maverick, surviving wife of Samuel A. Maverick, deceased, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, heirs-at-law of Samuel A. Maverick, deceased, according to their petition filed in the circuit court of the United States for the western district of Texas, at Austin.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court at Austin, this 30th day of August, A. D. 1871.

T. H. DUVAL,
U. S. Judge.

Teste, with seal of court, day and date above written.
[SEAL.] M. HOPKINS, *Clerk.*

1¾ (Indorsed:) 10 ch'y. In United States circuit court western district of Texas, in chancery, at Austin. Branch T. Masterson, assignee in b'k'p'cy of John H. Herndon, & Mary A. Maverick, surviving wife of Sam'l A. Maverick, dec'd, & others, heirs-at-law of S. A. Maverick, *dec'd, & others, heirs-at-law of S. A. Maverick,* appellants, vs. Volney E. Howard, Rich'd A. Howard, Russell Howard, Tho's H. Bennett, & others, heirs-at-law of Bainbridge D. Howard, dec'd, appellees. Citation on appeal. Iss'd Aug't 30, 1871. M. Hopkins, clerk.

Came to hand Sept. 2, 1871, and executed same day, by handing to

Geo. F. Moore, one of the solicitors of the appellees, a true copy of this writ, certified to be such, under the seal of the court, by the clerk of the court.

Sept. 2, '71.

THO'S F. PURNELL,
U. S. Marshal.
Per JOHN H. TRAYNHAM,
Deputy U. S. Marshal.

I certify that, on the 6th day of September, 1871, at San Antonio, in my district, I served the within writ of citation on appeal on Thomas S. Harrison, by showing to him the same, with the seal of the court thereon, and at the same time delivering to him a copy thereof, and also a copy for Russell Howard, and Thomas S. Harrison accepted service of the same as att'y and agent of Russell Howard.

THOMAS F. PURNELL,
U. S. Marshal.

Service accepted this 6th day of September, A. D. 1871.

RUSSELL HOWARD.
By T. S. HARRISON,
Agent & Att'y.

2 In circuit court of the United States for the western district of Texas, at Austin sitting. January term, A. D. 1867.

JOHN H. HERNDON
vs.
VOLNEY E. HOWARD ET AL.

Be it remembered that, on the 17th day of February, A. D. 1851, at Galveston, in the then district of Texas, in the district court of the United States, holding sessions at said city of Galveston, the said court then holding and exercising circuit court powers, came Bainbridge D. Howard, by his solicitors, Hughes & Howard, and filed in said court in chancery their bill of complaint, which bill is endorsed as follows, to wit:

C. 64. U. S. district court, in chancery. District of Texas. April term, 1851. B. D. Howard vs. Archibald Hodge et als. Original bill filed February 17th, 1851, and process issued same day. James Love, clerk.

And which is in words, to wit:

Bill.—Filed Feb. 17, 1851.

Petition.

To the Honorable John C. Watrous, judge of the district court of the United States for the district of Texas, in chancery sitting:

Bainbridge D. Howard, a citizen and resident of the city of New Orleans, and State of Louisiana, complainant, brings this his bill of complaint against Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick,
3 James P. Hudson, Samuel Luckie, Willard Richardson, and Sam-

uel S. Smith, citizens and residents of the State of Texas, and James A. Mason, a citizen of the State of Pennsylvania, defendants.

And, thereupon, your orator sets forth and complains that, on or about the 22d day of November, A. D. 1766, the government of Spain, according to the forms of law and by the regularly constituted officers of government, granted to the Indians of the population of the Mission of San José, a certain tract or parcel of land, situated, lying, and being in what is now the county of Medina, in the State of Texas, in the district of Texas aforesaid, being all that certain tract or parcel of land which is bounded as follows, to wit:

Beginning on the top of Padron Hill; thence, running from the north to the south, to the creek called the Alamos, at the crossing thereof, where there was placed a land-mark, near the road leading to the presidio of the Rio Grande; thence along the road westwardly to the arroyo or creek Palahuia, where there was placed a land-mark; thence turning towards the north to the road that comes from the cañon to the Loma Alta, where was placed a land-mark by piling stones a short distance from the land-mark of Baltazar Perez, an adjoining proprietor; thence following an east course to the said Padron Hill, the place of beginning. And your orator is informed and believes and is advised and so charges, that, by the laws of said government of Spain,
4 in force at the time of the making said grant, and subsequently thereto, operating on the said grant and the contract indicated thereby, an indefeasible estate in fee was vested in the said Indians of the population of the Mission of San José aforesaid.

Your orator further represents unto your honor that, by regular and complete conveyances in fee, from the said Indians then entitled, to those, or him under whom your orator claims, and to your orator, all the right, title, and interest of the said Indians in and to the said land, described as aforesaid, was, according to the forms of law, duly vested in your orator, and thereby he became and was seized and possessed of the same in fee; all which will more fully and at large appear by the grant to said Indians and the chain of conveyances down to your orator, to which, for greater certainty, at the hearing, your orator begs leave to refer. And your orator is advised that said grants and conveyances vested in your orator the dom*i*on and absolute property in and to the said tract or parcel of land described as aforesaid; and that he, or they under whom he claims, and those claiming under him, were and are in the actual occupation of the said tract or parcel of land; and he had well hoped that he, and those claiming under him, would have continued and remained in such occupation and possession undisturbed, without litigation, and without any cloud upon or impending over his title, and without the necessity
5 of harrassing or vexatious litigation as to the same. But now so it is, may it please your honor, that the said Archibald Hodge, Miles Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, and James A. Mason, combining and confederating to and with each other, and with others to your orator unknown, for the purpose of wronging and injuring your orator in the premises, have jointly or separately, in their own names, or in the names of others, made and c*a*used to be made, locations and surveys on large portions of the said tract or parcel of land, by virtue of certificates or warrants, or other rights to location, issued and acquired under the laws of the Republic of Texas; but whether they, or either of them, have obtained patents upon their said surveys, your orator is not informed; and by virtue of

said locations, surveys, and patents, if obtained, said parties pretend that they have obtained a right to so much of said tract or parcel of land as may be covered by said locations, surveys, and patents, if obtained; and by virtue of said pretended right, they, or some of them, have disturbed, and are disturbing, the seizin and possession of your orator, so obtained as aforesaid, though they well know that said locations, surveys, and patents, if obtained, are void and of no effect; and the said locations, surveys, and patents, if ob-
6 tained, form a cloud upon or impending over the title of your orator, which he is advised and believes cannot be removed and the title settled, and the possession of your orator to his tract or parcel of land aforesaid quieted at law without a multiplicity of actions and harrassing and vexatious litigation, all which is contrary to equity and good conscience. And for *and* asmuch as your orator is remediless at and by the direct and strict rules of the common law, and relievable only in equity, where matters of this and the like kind are only properly cognizable and relievable: To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

1. Have they, the said defendants, or either of them, or any other person or persons for them, or either of them, in their or either of their own names, or in the name or names of any other person or persons, and what person or persons, made or caused to be
7 made, any location or surveys by virtue of certificate or certificates, warrant or warrants, or by virtue of other rights to location and survey [within] the boundary of the tract or parcel of land aforesaid? and if yea, when were said locations and surveys, and each of them, made, and have patents issued on said locations and surveys? what was and is the amount or number of acres in each of said locations and surveys, or locations, its particular locality, and in whose name or names made?

2. Are the said locations and surveys, or either of them, in whole or in part, within the bounds of the tract or parcel of land aforesaid claimed by your orator; and, if not in the whole, how much and what part is without the same?

3. How much and what part of the said tract or parcel of land claimed by your orator as aforesaid is claimed by the said defendants, or either of them; and by what title, and when accrued?

4. What other locations and surveys, and how many, and when, and to what amount for each, have been made by any, and what, other person or persons, within the limits or boundary of the tract or parcel of land claimed by your orator as aforesaid?

And that, by decree to be rendered herein by your honor, the locations, surveys, and patents, if any, made within the limits of your orator's tract or parcel of land aforesaid, may be determined
8 and held to be void, and thereby the cloud impending over the title of your orator be removed; or that after establishment of the right in such manner as this court may direct by final decree to be then rendered, your orator may be qui'ted in his title and possession aforesaid, and all obstruction to the full and peaceable enjoyment of his property removed; or that, if your orator is mistaken in the special

relief hereby asked, such other or further relief be extended to him, or decree rendered in the premises, as the nature of the case may require: May it please your honor to grant unto your orator the United States writ of subpœna, directed to the said Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, commanding them to be and appear in this honorable court in the time and manner prescribed by the rules of the court, then and there to answer this bill, and to do further and receive what your honor shall order or direct in the premises. And your orator, as in duty bound, will ever pray, &c.

ROBERT HUGHES,
V. E. HOWARD,
Solicitors for Complainant.

9 NOTE.—Each one of the defendants *are* required to answer all the interrogatories in this bill contained, from No. 1 to 4, inclusive.

HUGHES & HOWARD,
For Complainant.

Two erasures and two interlineations on second page, one erasure and one interlineation on third page, and one erasure on each of *of* the fifth and sixth pages.

H. & H.

And afterwards, to wit, on the 17th day of March, A. D. 1851, a subpœna to J. H. Herndon was issued as follows, to wit:

Subpœna for J. H. Herndon.

Subpœna for J. H. Herndon.

UNITED STATES OF AMERICA,
District of Texas:

The President of the United States of America to J. H. Herndon, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battel, George
10 W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Samuel S. Smith, by Bainbridge D. Howard; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 17th day of March, A. D. eighteen hundred and fifty-one, and seventy-fifth year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

The defendant is required to enter his appearance in the above suit

in the clerk's office on or before the first Monday of April next; otherwise the bill will be taken as confessed.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received, 17th March, 1851, and executed on the same day by serving the within-named defendant, J. H. Herndon, in the city of Galveston, with a true copy of this subpœna, and exhibiting to him the original.

J. BATES, *U. S. M.*,
By J. B. BATES, *Deputy Marshall.*

And afterwards, to wit, on the 17th day of February, A. D. 1851,
11 a subpœna to J. H. Herndon was issued as follows, to wit:

Subpœna for J. H. Herndon.—Iss'd 17th Feb'y, 1851.

Subpœna for Herndon.

UNITED STATES OF AMERICA,
District of Texas:

The President of the United States of America to J. H. Herndon, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, and Samuel S. Smith; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judg' of the said court, and seal of court, at Galveston, the 17th day of February, A. D. eighteen hundred and fifty-one, and 75 year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

12 The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday in April next, 1851; otherwise the bill will be taken as confessed.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received February 17th, 1851, and executed on the 24th day of March, 1851, by serving the within-named defendant, J. H. Herndon, with a true copy of this subpœna and exhibiting to him the original.

J. BATES, *U. S. Marshal.*
By J. R. MILLER, *Deputy Marshall.*

Subpœna for A. Hodge.—Iss'd Feb'y 17, 1851.

Subpœna for A. Hodge.

UNITED STATES OF AMERICA,
District of Texas:

The President of the United States of America to Archibald Hodge, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Miles M. Battel, George W. Price, R. C. Garza, W.
13 E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, and Samuel S. Smith; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and the seal of court, at the city of Galveston, this 17th day of February, A. D. eighteen hundred and fifty-one, and 75 year of the independence of the United States of America.

[L. S.] *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office, on or before the first Monday of April next, 1851, otherwise the bill will be taken as confessed.

Clerk.

The following return appears upon the original of the above subpœna, to wit:

Return.

Received February 17th, 1851, and executed on the 24th day of March, 1851, by serving the within-named defendant, Archibald Hodge, with a true copy of this subpœna, and exhibiting to him the original.

J BATES, *U. S. Marshall.*
By JOHN R. MILLER,
Deputy Marshall.

And on the 17th day of February, A. D. 1851, a subpœna for Willard Richardson was issued as follows:

14 *Subpœna for Willard Richardson.—Iss'd Feb'y* 17, 1851.

Subpœna for W. Richardson.

UNITED STATES OF AMERICA,
District of Texas:

The President of the United States of America to Willard Richardson greeting:

You are hereby comma'ded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction

of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, and Samuel S. Smith; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 17th day of February, A. D. eighteen hundred and fifty-one, and 75th year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

15 Received Feb'y 17, 1851, and executed the 21st day of February, 1851, by serving the within-named defendant Willard Richardson with a true copy of this subpœna, and exhibiting to him this original.

J. BATES,
U. S. Marshal.
By J. B. BATES,
Deputy M.

16 And, on the 17th day of February, 1851, a subpœna was issued to Miles M. Battel, as follows, to wit

Subpœna & return for M. M. Battell.—Iss'd Feb. 17, 1851.

Subpœna for M. M. Battel.

UNITED STATES OF AMERICA,
District of Texas:

The President of the United States of America to Miles. M. Battel, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel Luckie, Willard Richardson, Samuel S. Smith, Samuel A. M. Maverick, and James P. Hudson; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 17th day of February, A. D. eighteen hundred and fifty-one, and 75th year of the independance of the United States of America.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received Feb'y 17th, 1851, and executed the 24th day of March,
17 1851, by serving the within-named defendant, Archibald Hodge, with a true copy of this subpœna, and exhibiting to him the original.

J. BATES, *U. S. Marshal.*
By JOHN R. MILLER, *Deputy.*

NOTE.—And it appears that certain subpœnas and alias subpœnas were issued during the months of February & October, A. D. 1851, the returns upon which show the respective persons to be "not found," or "dead," to the following persons, to wit: Samuel Luckie, James P. Hudson, George W. Price, Samuel A. Maverick, R. C. Garza, Samuel S. Smith; alias sub.: James P. Hudson, R. C. Garza.

And, on the 28th day of October, A. D. eighteen hundred and fifty-one, an alias subpœna was issued to Samuel A. Maverick as follows, to wit:

Alias subpœna for S. A. Maverick, & return.—Iss'd Oct. 28, 1851.

Alias s'p'a for Maverick.

UNITED STATES OF AMERICA,
District of Texas:

The President of the United States of America to Sam'l A. Maverick, greeting:

You are hereby commanded, as you have before been, to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of December, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, J. H. Herndon, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, James P. Hudson, Samuel Luckie, Willard Richardson, and Samuel S. Smith, by Bainbridge D. Howard; and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 28th day of October, A. D. eighteen hundred and fifty-one, and 76th year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clk.*

Return.

Received October 28th, 1851, and executed on the 18th day of November, 1851, by giving the within-named defendant a copy of this subpœna.

J. BATES,
U. S. Marshal.

18 Received October 28th, 1851, and executed on the 18th November, 1851, by giving the within-named defendant a copy of this subpœna.

J. BATES, *U. S. M.*

And, on the 28th day of October, A. D. 1851, an alias subpœna was issued to Samuel S. Smith, as follows, to wit:

Alias subpœna for Sam. S. Smith.—Iss'd 28th Oct., 1851.

Alias s'p'a for S. S. Smith.

UNITED STATES OF AMERICA,
District of Texas:

The President of the United States of America to Samuel S. Smith, greeting:

You are hereby commanded, as you have before been to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden at the city of Galveston, in and for said district, on the first Monday of December, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, and Willard Richardson, by Bainbridge D. Howard; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

19 Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 28th day of October, A. D. eighteen hundred and fifty-one, and seventy-sixth year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

The following return appears upon the original of the above alias subpœna, viz:

Return.

Received Oct. 28th, 1851, and executed on the 24th day of November, A. D. 1851, by giving the within defendant a copy of this alias subpœna.

J. BATES, *U. S. M.*

Alias subpœna for S. Luckie.—Iss'd 28th Oct., 1851.

Alias subpœna for S. Luckie.

UNITED STATES OF AMERICA, *District of Texas:*

The President of the United States of America to Samuel Luckie, greeting:

You are hereby commanded, as you have before been, to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on

the first Monday of December, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battell, George W. Price, R. C. Garza, W. E. Howth, J. H.
20 Herndon, Samuel A. Maverick, James P. Hudson, Willard Richardson, and Samuel S. Smith, by Bainbridge D. Howard; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 28th day of October, A. D. eighteen hundred and fifty-one, and seventy-sixth year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of December next; otherwise the bill will be taken as confessed.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above alias subpœna, to wit:

Return.

Received Oct. 28th, 1851, and executed on the 24th day of November, A. D. 1851, by giving the within-named defendant a true copy of this alias subpœna.

J. BATES, *U. S. M.*

And afterwards, at Austin, in said district of Texas, the Honorable Jno. C. Watrous, judge of said district, presiding—

Upon the minutes of the court at Austin appears the following entry in blank:

TUESDAY MORNING, 18*th November*, 1851.

B. D. HOWARD *vs.* ARCHIBALD HODGE ET ALS. } In chancery.

21 *Order.—Entered at Austin, Nov.* 18, 1851.

And afterwards, at the city of Austin, in the then district of Texas, the following entry appears on the minutes of the court:

AUSTIN, *Tuesday Morning, Nov.* 18, 1851.

B. D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } In chancery.

B. D. HOWARD *vs.* ARCHIBALD HODGE. } Action at law.

Upon application of the parties aforesaid, by their attorneys, and with their consent, it is ordered that these cases be adjourned for hear-

ing and trial from the district of the court at Galveston to this place; and the clerk of the court at Galveston is hereby ordered and directed to transmit all the original papers in said case, together with a transcript of all the proceedings on record, with all convenient dispatch, to the clerk of the court here.

And afterwards the following agreement, endorsed to wit, "701. C. 64. Bainbridge D. Howard vs. Archibald Hodge et als. Agreement. Filed March 26th, 1855. James Love, clerk," and which was made and filed at Galveston, in s'd district, appears among the papers forwarded to Austin, and is in words to wit:

Agreement transferring.—Filed March 26, 1855.

District court U. States, dist. of Texas.

BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET ALIO. } Two cases at law and in equity.

In these causes, an order having passed the court that they be transferred to and entered on the docket of this court, at the city of Austin, to be there proceeded in, it is now agreed between the undersigned, counsel for the plaintiff and defendants in the above causes, that
22 the papers and files of the said causes be conveyed to the city of Austin by Robert Hughes, esq., of counsel for the plaintiff, and delivered to the clerk of the district court there.

Galveston, March 26th, 1855.

ROB. HUGHES.
G. W. PASCHAL.
Pp. L. A. THOMPSON.

And afterwards, to wit, on the ninth day of February, A. D. 1858, the following entry appears upon the minutes of the court—

Hon. Thomas H. Duval, presiding judge, west'n dist. Texas:

Suggestion of death of compl't, & order leave to revive.—Ent'd 9 *Feb.*, 1858.

BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } Chancery. No. 10.

Now, on this day, came compl'ts, by their solicitor, and came also counsel for defendants, and the death of Bainbridge D. Howard being suggested, the court is moved that new parties be made to this cause; and, there being no opposition, leave is granted to the complainant to file his bill of revival.

And afterwards, at December rules, A. D. 1858, the defendants, by their solicitors, J. A. &. George W. Paschal, filed in the clerk's office their dismissal of the cause for want of revival by complainant, which was filed and entered in the rule or order book, and which is in words to wit:

Order at rules dismissing bill.—December rules, 1858.

BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } No. 10. Chancery.

The complainant having failed to revive this cause after suggestion of death, it is dismissed.

23 J. A. & GEO. W. PASCHAL,
Sol's pro Comp'ts.

MATTHEW HOPKINS, *Clerk.*

Filed rules Decem., 1858.

And afterwards the complainants, by their solicitor, filed the following motion, which appears upon the rule-book of this court, to wit:

Motion to set aside dismissal—Filed January rules, Jan'y 1, 1859.

Motion to set aside dismission at rules. Jan'y rules, Jan. 1st, 1859. No. 64. In chancery. In the United States district court for the western district of Texas, at Austin.

BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } Chancery.

In the above entitled and numbered cause, Volney E. Howard, a citizen of the State of California, residing at San Francisco, one of the heirs-at-law of *of* Bainbridge D. Howard, deceased, the complainant therein, in behalf of himself and the other heirs-at-law of said deceased, moves the court to set aside the order of dismissal entered at the last rule day, at the costs of the party who caused the same to be entered, and he asks leave to refer to the papers on file in said cause and the orders heretofore made therein, together with such affidavit or affidavits showing facts, as he may file at or before the hearing of the motion, in support thereof.

Jan. 1st, 1859.

VOLNEY E. HOWARD,
Per ALEXANDER,
His Solicitor.

24 And the following affidavit appears in the papers of the cause, endorsed as follows, to wit, "Bainbridge D. Howard vs. Archibald Hodge et el. Filed Jan'y 5th, 1859. Matthew Hopkins, clerk." And in words, to wit:

Affidavit in support of motion.—Filed Jan'y 5, 1859.

In the U. S. dist. court, at Austin, in ch'y.

B. D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } No. 64. Affidavit.

This affiant, being duly sworn, makes oath and says that this affiant Russell Howard and Richard A. Howard, citizens of the State of Texas,

Volney E. Howard, a citizen of the State of California, Mehitibel Howard, Thomas F. Bennet, and his wife, Caroline H. Bennet, Ephraim H. Lambard and his wife, Julia A. Lambard, the last five named citizens of the State of Illinois, are the sole heirs of Bainbridge D. Howard, deceased, late a citizen of the State of Louisiana, and complainant in the above-entitled cause.

Affiant says that, some time in November or December, A. D. 1851, said B. D. Howard died; that, being in delicate health, he started on a voyage to Naples, in the Kingdom of Italy, and died at sea, on his outward voyage, and it was some considerable time before the news of his death, which came from Italy, reached the State of Texas.

25 Affiant further says that, at the date of the death of said B. D. Howard, the said M. Howard, T. F. Bennett & C. H. Bennet, resided in the interior of the State of New York, near the Genesse Valley; that E. H. Lambard & said Julia A. Lambard resided at Brandon, in the State of Mississippi; that said V. E. Howard removed to the State of California in the fall of the year, A. D. 1853; that, afterwards, the said Lambards and said Bennets removed, respectively, from Mississippi and New York to said State of Illinois.

Affiant further says that, during the lifetime of said B. D. Howard, said suit was in charge of said V. E. Howard, as attorney for the complainant, who had joined with him Judge Rob't Hughes, of Galveston, in the State of Texas; that, about the month of Jan., A. D. 1855, this affiant went to Galveston, and applied to said Rob't Hughes for the important proofs and documents of complainant in said cause, and had said cause removed to Austin. Said Hughes replied to affiant that he did not think he had them and did not know where they were.

Affiant further says that, afterwards, to wit, on or about the day of July, A. D. 1857, the said Richard A. Howard wrote to said V. E. Howard, in California, in regard to said papers and proofs, and asking where they were. Said V. E. Howard replied that they were in the hands of said Hughes, or if not, they might be among the papers of said B. D. Howard, in the city of New Orleans, State of Louisiana; and afterwards, to wit, about the month of December, A. D. 1857, the

26 said R. A. Howard went to said city and made search among the papers of said estate and failed to find said documents, after due diligence in said search. Affiant then, being convinced that said papers were in the hands of said Hughes, on or about the 20th day of November, A. D. 1858, started from Bexar County to Galveston, Texas, with the sole business to procure said papers from said Hughes. Upon arriving near the court affiant learned that said Hughes was about removing his office from Galveston to Goliad, Texas, and was not then in Galveston. Affiant followed said Hughes to Refugio, Texas, where he overtook him, and again made application for the same to him, and said Hughes again repeated that he did not think he had them, but would make search when he returned to Goliad. Affiant waited until said Hughes returned there when, upon a search and examination, in December, about the 5th or 6th, 1858, said Hughes found said papers and gave them to this affiant. The papers and documents alluded to in this affidavit are a certified translated copy of the original title to McMullen of the title to the land in controversy in this suit, the original transfer of the right claimed by B. D. Howard therein from said John McMullen to said B. D. Howard, and other valuable and important papers connected with said suit. Affiant further says that as soon a' practicable, and before the first day of the present term of said court, he brought said papers to Austin, Texas, and proceeded to prepare said cause for revival.

27 Affiant further says that, after the return of said Richard A. Howard from New Orleans, and after said search, the said R. A. Howard, in January, A. D. 1858, again wrote to said V. E. Howard, and also to said Hughes in relation to said business and papers, without being able to procure the same.

Affiant further says that said M. Howard is the mother of said B. D. Howard, and said Julia A. Lambard and Caroline H. Bennet are his sisters, and said V. E. Howard, R. A. Howard, and affiant are his brothers; and further that said B. D. Howard, left no lineal descendants, or other heirs than these, as he verily believes; that the aforesaid transfer from John McMullen to B. D. Howard is only an equitable title, and the same is not registered; and without said transfer the said heirs of B. D. Howard could not successfully prosecute this suit, there being no other written evidence in existence of the rights of said deceased.

Affiant further says that he is informed that Rafael C. Garza, James P. Hudson, and Samuel Luckie, named as defendants in original bill, are dead. And affiant further says that said John McMullen is also dead.

And further affiant saith not.

RUSSELL HOWARD.

Sworn to and subscribed before me, Matthew Hopkins, clerk of the United States court for the western district of Texas, and ex-officio U. S. commissioner.

MATTHEW HOPKINS,
Clerk, &c.

And the following order appears upon the chancery minutes of this court, to wit:

28 *Order setting aside dismissal at rules.—Ent'd Feb.* 4, 1859.

BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } Dismission at rules set aside.

FEBRUARY 4, 1859.

Now, on this day, came the solicitor for complainant, and, upon his motion, it was ordered that the judgment of dismissal entered at rules, by the solicitors of defendants, be, and the same is hereby, set aside.

And, afterwards, to wit, on the 29th day of January, A. D. 1859, complainant, by solicitor, filed a bill to revive, endorsed as follows, to wit: "Ch'y 64. No. 10. Chancery. Bainbridge D. Howard's heirs vs. Bill to revive, &c., Hodge et al. Filed January 29th, 1859. M. Hopkins. Alexander, solicitor for complainants;" and in words as follows, to wit:

Bill of revivor.—Filed Jan'y 29, 1859.

Bill of revivor.

To the Honorable Thomas H. Duval, judge of the district court of the United States for the western district of Texas, holden at Austin, in chancery, sitting:

Humbly complaining, show unto your honor, your orators, Volney E. Howard, who is a citizen of the State of California; Richard A. Howard and Russell Howard, who are citizens of the State of Texas; Thomas

H. Bennet and Caroline H. Bennet, (formerly Howard,) his wife, Ephraim H. Lambard, , (formerly Howard,) his wife, and Mehatibel Howard, each of whom is a citizen of the State of Illinois, that the aforesaid Volney E., Richard A., and Russell, are the

29 surviving sisters, and that said Mehitabel is the mother (she being a widow) of Bainbridge D. Howard, deceased, and that they are the sole heirs-at law of said deceased.

And your orators further show that said Bainbridge D. Howard, deceased, did, in his lifetime, to wit, on the seventeenth day of February, A. D. 1851, file his bill of complaint against Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, unto which bill your orators refer, adopting the allegations and prayer for relief thereof. And that said Bainbridge D. Howard died in the autumn of said A. D. 1851, at sea, on a voyage from the United States of America to Italy, before said defendants had filed his answer unto said bill of complaint.

And your orators further show that, since the death of said Bainbridge D. Howard, the following named of said defendants have also departed this life, to wit, R. C. Garza, James P. Hudson, and Samuel Luckie, and that, in consequence of the death of all of the aforesaid, who are aver'ed to be dead, the suit of said Bainbridge D. Howard, deceased, became and is abated. And your orators further show unto your honor that one Antonio Sierra has married Maria Antonia Veramendi y Sierra, who was the widow of said R. C. Garza, deceased; and that said Maria, together with Juan Garza and Adolfo Garza, who are the infant sons of said R. C. and said Maria, are the sole heirs-at-law of said R. C. Garza, deceased, and that they are citizens of the State of Texas, and reside in or near the county of Bexar therein; and

30 that is the heir-at-law of said James P. Hudson, deceased, and is a citizen of said State of Texas, residing in county therein; and that William F. Luckie, whose citizenship and residence are unknown to your orators, is the surviving brother and is the heir-at-law of said Samuel Luckie, deceased. To the end therefore that said suit and the proceedinge therein may stand revived, and be in the same plight and condition that they were in at the time of the death of said Bainbridge D. Howard, and that your orators may have the benefit thereof, may it please your honor to grant the writ of subpœna to revive and answer, issuing out of and under the seal of this honorable court, directed to the original surviving defendants to this suit and to the aforesaid heirs-at-law of such of them as are dead, thereby commanding them, under a certain pain therein to be limited, to appear and answer the premises and to show cause, if any they can, why said suit and the proceedings therein should not stand revived against them and be in the same plight and condition as they were at the time of the death of the said Bainbridge D. Howard; and, further, to abide such order and decree in the premises as your honor shall deem meet. And your orators shall ever pray.

ALEXANDER,
Solicitor for Complainants.

JANUARY 29TH, 1859.

And thereupon subpœnas were issued as follows, to wit:

Subpœna for S. S. Smith.—Iss'd 2 May, 1859.

Subpœna for S. S. Smith.

UNITED STATES OF AMERICA,
Western District of Texas:

The President of the United States to Samuel S. Smith, greeting:

31 You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of next, or whensoever said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife; and Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife; and Mehitable Howard, the remaining brothers, sisters, and mother of Bainbridge D. Howard, deceased, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, J. H. Herndon, James P. Hudson, Samuel Luckie, Willard Richardson, and James A. Mason, defendants in original bill, (and, R. C. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, widow of said R. C. Garza, dec'd, and Juan Garza and Adolfo Garza, infant sons of said R. C. Garza, dec'd, and said Maria; and heir-at-law of James P. Hudson; and William F. Luckie, surviving brother and heir-at-law of Samuel Luckie, dec'd, to shew cause, if any you have, why the cause shall not be revived; and to do further and receive what the court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

32 Witness the Honorable Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2d day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

[L. S.] MATTHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of July next, otherwise the bill will be taken for confessed.

MATTHEW HOPKINS, *Clerk.*

The following return appears upon the original of the foregoing subpœna, to wit:

Return.

Came to hand on 7th day of May, A.D. 1859, and executed on the 7th day of May, 1859, by serving Samuel S. Smith, within-named def't, in person, with a true copy hereof, in the county of Bexar, 80 miles from the city of Austin.

W. C. YOUNG,
U. S. Marshal, W. D., Texas.
By SAMUEL NEWTON,
Deputy.

Subpœna for W. E. Howth.—Iss'd 2d May, 1859.

Subpœna for W. E. Howth.

UNITED STATES OF AMARICA,
Western District of Texas:

To the marshal of the eastern district of Texas—the President of the United States to W. E. Howth, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday next, or whensoever said court shall there be, to answer a bill of revivor of
33 Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife; Epraim H. Lombard, and Julia A. Lombard, (formerly Howard,) his wife; and Mehitable Howard, surviving brothers, sisters, and mother of Bainbridge D. Howard, deceased, exhibited against you, being impleaded with Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, defendants in original bill, (and, R. C. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, the widow of R. C. Garza, dec'd, and the said Maria; and the heir-at-law of said James P. Hudson, dec'd; and William F. Luckie, surviving brother and heir-at-law of Samuel Luckie, dec'd, to show cause, if any you have, why the cause shall not be revived; and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2nd day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

[L. S.] MATTHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday in July next; otherwise the bill will be taken as confessed.

MATTHEW HOPKINS, *Clerk.*

34 The following return appears upon the original of the above subpœna, to wit:

Return.

Received May 9th, 1859, and executed June 4th, 1859, in the county of Austin, by serving the defendant, W. E. Howth, a true c'y of this writ, as certified by cl'k of the U. S. district, at Austin, Texas.

H. E. McCULLOCH,
U. S. Marshal.
By JOHN P. FENELL, *Deputy.*

Subpœna for John H. Herndon.—Iss'd May 2, 1859.

Subpœna for Herndon.

UNITED STATES OF AMERICA,
Western District of Texas:

To the marshal of the eastern district of Texas—the President of the United States to J. H. Herndon, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of June next, or whensoever said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife; Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife; and Mehitable Howard, surviving brothers, sisters, and mother of Bainbridge D. Howard, deceased, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, James P. Hud-
35 son, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, defendants in original bill, (and, R. C. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, widow of said R. C. Garza, dec'd, and Juan Garza and Alolph Garza, infant sons of R. C. Garza, dec'd, and said Maria; and the heirs-at-law of said James P. Hudson, dec'd; and William F. Luckie, surviving brother and heir-at-law of Samuel Luckie, dec'd, to show cause, if any you have, why the cause should not be revived; and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of the said court, and seal of court, at the city of Austin, this 2nd day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

[L. S.] MATTHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of July next; otherwise the bill will be taken as confessed.

MATTHEW HOPKINS, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received May 9th, 1859, and executed on the 14th day of the
36 same month, at Galveston, by giving the defendant, J. H. Herndon, a true copy of this writ, as certified by the clerk of the district court of the United States for the western district of Texas, at Austin.

H. E. McCULLOCH,
U. S. Marshal.

Subpœna for W. Richardson.

UNITED STATES OF AMERICA,
Western District of Texas:

To the marshal of the eastern district of Texas—the President of the United States to Willard Richardson, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of June next, or whensoever said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife; and Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife; and Mehitable Howard, the surviving brothers, sisters, and mother of Bainbridge D. Howard, deceased, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, J. H. Herndon, James P. Hudson, Samuel Luckie, Samuel S. Smith, and James A. Mason, defendants in original bill, (and, R. C. Garza, James P. Hudson, Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, the widow of R. C. Garza, dec'd, and Juan Garza and Adolfo Garza, infant sons of said R. C.
37 Garza, dec'd, and said Maria; and heir-at-law of said James P. Hudson, dec'd; and William F. Luckie, surviving brother and heir-at-law of Samuel Luckie, dec'd, to show cause, if any you have, why the cause shall not be revived; and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2nd day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

MATTHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of July next, otherwise the bill will be taken as confessed.

MATTHEW HOPKINS, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received May 9th, 1859, and executed same day, by giving the defendant, Willard Richardson, a true copy of this writ, as certified by the clerk of the district court of the United States for the western district of Texas, at Austin.

H. E. McCULLOCH,
U. S. Marshal.

Subpœna for heirs of R. C. Garza.

UNITED STATES OF AMERICA,
Western District of Texas:

The President of the United States to Antonio Sierra, husband of
38 Maria Antonia Veramendi y Sierra, heirs of R. C. Garza, dec'd; Juan and Adolfo Garza, infant sons of said R. C. Garza, dec'd; and said Maria, widow of said R. C. Garza:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of June next, or whensoever said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife; and Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife; and Mehitabel Howard, the remaining brothers, sisters, and mother of Bainbridge D. Howard, dec'd, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, J. H. Herndon, James P. Hudson, Samuel Luckie, Willard Richardson, James A. Mason, Samuel S. Smith, defendants in original bill, (and, the said R. C. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with , heir-at-law of James P. Hudson, dec'd; and William F. Luckie, surviving brother and heir-at-law of Samuel Luckie, dec'd, to show cause, if any you have, why the cause shall not be revived; and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of said court, and
39 seal of court, at the city of Austin, this 2nd day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

[L. S.] MATTHEW HOPKINS, *Clerk.*

The defendants are required to enter their appearance in the clerk's office on or before the first Monday of July next; otherwise the bill will be taken as confessed.

MATTHEW HOPKINS, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Came to hand on the seventh day of May, A. D., 1859, executed on the 15th day of May, 1859, by serving Maria, late widow of R. C. Garza. now wife of Antonio Sierra, within-named defendant, in person at her house, in Bexar County, with a true copy of this subpœna; and, at the same time and place handed her true copies of the above subpœna for the within-named defendants, Antonio Sierra and Adolfus Garza, she being the wife of Antonio Sierra and mother of Adolfus Garza, now of full age, it being their home, requesting her to deliver the same to the proper persons, which she promised to do. May 28th, 1859, handed in person

to the other named defendant, Juan Garza, a true copy of this subpœna, in Bexar County.

W. C. YOUNG,
U. States Marshal W. D. Texas.
By SAM'L NEWTON,
Deputy.

Subpœna for Maverick.

UNITED STATES OF AMERICA,
Western District of Texas:

The President of the United States to Samuel A. Maverick, greeting:

You are hereby commanded to appear personally before the
40 honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of June next, or whensoever the said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife; and Ephriam H. Lombard and Julia A. Lombard, (formerly Howard,) his wife; and Mehitabel Howard, surviving brothers, sisters, and mother of Bainbridge D. Howard, dec'd, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battell, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, defendants in original bill, (and, R. C. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonio Veramendi y Sierra, the widow of R. C. Garza, dec'd, and Juan Garza and Adolfo Garza, infant sons of of R. C. Garza, dec'd, and the said Maria; and , heir-at-law of James P. Hudson, dec'd, and William F. Luckie, surviving brother of Samuel Luckie, dec'd, to show cause, if any you have, why the cause shall not be revived; and to do further and receive what the said court shall have considered in this behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2nd day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States.

[L. S.] MATTHEW HOPKINS, *Clerk.*

41 The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of July next, otherwise the bill will be taken as confessed.

MATTHEW HOPKINS, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Came to hand on the seventh day of May, A. D. 1859, and executed on the seventh day of May, 1859, by serving Samuel A, Maverick, the

within-named defendant, in person, with a true copy of this subpœna, in the county of Bexar, 80 miles from the city of Austin.

W'M C. YOUNG,
U. S. Marshal W. D. Texas.
By SAM'L NEWTON,
Deputy.

Subpœnas not served.

And it appears that, on the 4th of May, 1859, subpœnas were issued to the following persons, but not served, to wit: George W. Price, William F. Luckie, surviving brother and heir-at-law of Samuel Luckie, dec'd; Archibald Hodge, Miles M. Battel, James A. Mason, heir-at-law of James P. Hudson.

Alias subpœna Miles M. Battell.—Iss'd 22 Sept., 1859.

And it appears that, on the 22d of September, 1859, an alias subpœna was issued to Miles M. Battell, and upon the original thereof is the following return, viz:

"The within-named Miles Battell not found in my district.
"H. E. McCULLOCH, *U. S. M.*
"By S. M. STORY, *Act'g.*"

42 And the following entry appears upon the rule-book of this court, to wit:

Pro confesso taken at Sept. rules against def'ts.—Served Sept. 5, 1859.

Rule taking bill pro confesso as to def't's. Served Sept. rules, Sept. 5th, 1859.

BAINBRIDGE D. HOWARD' HEIRS
vs.
ARCHIBALD HODGE ET AL. } No. 10.

AT RULES, *September 5th, A. D.* 1859.

It being made to appear from an inspection of the papers in this cause that subpœnas issued upon the bill to revive, and answer, filed therein on January 29th A. D. 1859, had been duly served more than twenty days prior to the rule day in July last, upon which day said subpœnas required appearance to be entered upon Samuel S. Smith, Samuel A. Maverick, Willard Richardson, John H. Herndon, William E. Howth, Antonio Sierra and Maria his wife; and Juan Garza, and Adolfo Garza, the infant sons of said Maria, it is ordered that said bill be held to have been revived as of course; and, inasmuch as each of said defendants has failed to enter an appearance on the rule day in July last, and has also failed to answer said bill as revived, it is further ordered that said bill be taken for confessed as against each of them, and that alias subpœnas be issued for each of the residue of the defendants that have not been served that complainants by their solicitor may desire.

ALEXANDER,
Sol. for Complainants.

Attest:
MATTHEW HOPKINS, *Clerk.*

43 Afterwards, on the 25th of June, 1860, the following agreement in writing was filed, to wit:

Agreement to set aside pro confesso taken at Sept. rules, '59.—Filed June 25, 1860.

Agreement to set aside judgment at rules pro confesso.

In the district court of the U. S. for the western district of Texas, at Austin. June term, A. D. 1860.

B. D. HOWARD'S HEIRS
vs.
HODGE ET AL. } No. 10. Ch'y.

It is hereby agreed that the decree in the above-entitled and numbered cause, entered on the fifth day of September, A. D. 1859, taking the bill pro confesso, be set aside, the defendant Herndon to pay the one-half of all the costs of complainants as to said defendant Herndon to date; that the complainants have leave at any time before next rule day to file a supplemental bill in the nature of a bill of revivor; and that such of the defendants as are parties to this agreement shall appear without further process, and are to have the time extended to them until the third rule day after the filing of supplemental bill, &c., to answer the same. This agreement is to be entered as an order in said cause, and is not to prejudice the complainants in making parties, or in their proceedings against any other persons than those who subscribe the same. The death of the defendant Howth is suggested, and said decree is set aside as to him. The words "as to said defendant "Herndon" interlined above the signing.

Austin, June 20, 1860.

J. A. &. G. W. PASCHAL,
For Herndon.
SAMUEL A. MAVERICK.

44 And the following order appears upon the chancery minutes of this court, to wit, June 25th, 1860:

Order setting aside pro confessos.—Entered June 25, 1860.

Order pursuant to agreement.

On this day the court then sitting on the law side of the court, the following order was had in equity.

BAINBRIDGE D. HOWARD'S HEIRS
vs.
ARCHIBALD HODGE ET AL. } 10. Chancery.

On this day came the solicitor for complainants, William Alexander, and, on his motion, and upon the agreement filed therein, it is ordered that the decree entered on the fifth day of Sept., A. D. 1859, taking the bill pro confesso, be set aside, the defendant Herndon to pay one-half of all the costs of complainants as to said defendant Herndon to date; that the complainants have leave at any time before next rule day to file a supplemental bill in the nature of a bill of revivor; and

that such of the defendants as are parties to this agreement shall appear without further process, and are to have the time extended to them until the third rule day after the filing of supplemental bill, &c., to answer the same; the agreement and order therein not to prejudice the complainants in making parties, or in their proceedings against any other persons than those who subscribe the same. The death of defendant Howth being suggested, the decree not to operate as to him.

The following order appears upon the chancery minutes of this court, to wit:

Order giving leave to file supplemental bill, &c., reviving suit, &c.—June term, A D. 1860, June 29th, 1860.

45 B. D. HOWARD'S HEIRS *vs.* HODGE ET ALS. } In ch'y. No. 10.

On motion of the solicitor for the complainants, it is ordered by the court that complainants have leave now to file in open court their supplemental bill, as is stipulated in the agreement filed therein at this term.

It is further ordered that this suit stand revived in the name of Volney E. Howard, Thomas H. Bennett and Caroline H. Bennett, his wife; Ephraim H. Lombard and Julia A. Lombard, his wife; and Mehitabel Howard, as against the parties against whom a decree pro confesso has been entered, which has not, as to them, been set aside, and as against the defendants John H. Herndon and Samuel A. Maverick; and that Francis Wurzbach, on being served with a subpœna, be made a party defendant to said bill.

And thereupon complainants, by their solicitor, filed a supplemental bill, which is endorsed as follows, to wit: "No. 10. Ch'y. B. D. Howard's heirs vs. Hodge et al. Supplemental bill filed by order of court, June 28, 1860. M. Hopkins, clerk. Alexander, solicitor for complainants. Supplemental bill. (Endorsed:) Filed June 29, 1860. M. Hopkins, clerk."

Supplemental bill.—Filed June 29, 1860.

To the judge of the district court of the United States for the western district of Texas, having circuit powers and jurisdiction, sitting at Austin:

Humbly complaining, your orators, Volney E. Howard, who is a citizen of the State of California; Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife; Ephraim H. Lombard and Julia
46 A. Lombard, (formerly Howard,) his wife; and Mehitabel Howard, each of whom is a citizen of the State of Illinois, show unto your honor that their citizenship is as they have stated, and that they, together with Richard A. Howard and Amelia L., his wife, who was the widow of Bainbridge D. Howard, deceased; and Russell Howard, are the sole surviving heirs-at-law of said deceased; said Mehitabel being the mother; said Amelia L. having been the widow; said Caroline H. and Julia A. being the surviving sisters; and said Volney E., Richard A., and Russell being the surviving brothers of said deceased, whose father died in his life-time.

And your orators aver that said Bainbridge D. Howard did, in his life-time, to wit, on the seventeenth day of February, A. D. 1851, file his bill of complaint against Archibald Hodge, Miles M. Battell, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, James A. Mason, unto which they file this, their supplemental bill, in the nature of a bill of revivor, and that said Bainbridge D. Howard departed this life, at sea, on a voyage from the United States of America to Italy, in the autumn of said A. D. 1851, before said defendants had filed their answer to his said bill of complaint.

And your orators further aver that, since the decease of the said Bainbridge D. Howard, deceased, said Richard A., Amelia L., and Russell Howard have, by conveyance, signed, sealed, and delivered, conveyed their entire interest in and to the tract of land in said bill of complaint described unto the said Volney E. Howard.

47 And your orators, adopting the allegations of said bill of complaint touching the original grant of said tract of land from the government of Spain, and also the description thereof therein given, further represent that, by regular and complete conveyances, the fee-simple title granted by said government of Spain to the Indians of the population of the Mission of San José, was granted unto one John McMullen, now deceased, who thereby became vested with all the right, title, and interest in and to the land described as aforesaid, and with actual possession thereof.

And your orators further aver that, for a valuable consideration therein expressed, said John McMullen, in his life-time, to wit, on the fifth day of November, A. D. 1849, executed an instrument or covenant in writing by him signed, but which, through mistake, was not sealed and witnessed by two witnesses, so as to take effect as a deed, as was intended, unto said Bainbridge D. Howard, deceased, who thereby became vested with the equitable title to, and obtained actual possession of, said tract of land, though he departed this life as aforesaid, without having discovered said mistake, &c., without having caused his equitable title to be converted into a legal title, as he was of right entitled to do.

And your orators aver that, some time after the execution of said instrument or covenant, whereby said John McMullen conveyed the equitable title to said tract to said Bainbridge D. Howard, deceased, said John McMullen departed this life, and that are his sole heirs-at-law; and your orators averring that, by the laws in force at the time of the original grant to said Indians, and subse-

48 quently thereto, operating on said grant and the contract indicated thereby, an indefeasible estate in fee was vested in said Indians and in those claiming and deraigning title through them, down to and including said John McMullen, deceased, and that a valid, equitable title to said tract was made by said McMullen to said Bainbridge D. Howard, dec'd, which is now vested in your orators as his heirs-at-law, and as aforesaid; all of which will more fully and at large appear by the grant to said Indians, together with the chain of conveyances down to said McMullen, and by said instrument; to all of which, or to certified copies of the records thereof, if the originals cannot be produced, for greater certainty, at the hearing hereof, your orators crave leave to refer.

And your orators further aver that, since the death of said John McMullen and of said Bainbridge D. Howard, said heirs-at-law of said McMullen, although well apprized of all that has been hereinbefore

alleged, have wholly neglected and failed, and still continue to neglect and fail, to make unto your orators a legal title, as in equity and good conscience they were bound to do, to said tract of land.

And your orators further aver that, since the commencement of this suit, said Miles M. Battell, R. C. Garza, W. E. Howth, James P. Hudson, and Samuel Luckie have departed this life; and that they have ascertained that said James A. Mason is not a citizen of the State of Texas, and has and claims no interest in any part of said tract, and that said Archibald Hodge has sold out his interest in said tract to John H. Herndon, who likewise, since the commencement of this
49 suit, and prior to the decease of said Miles M. Battell, purchased his interest in said tract.

And they further aver that the heirs-at-law of said Samuel Luckie, deceased, are not citizens of the State of Texas; and that said W. E. Howth, deceased, as they have recently been informed and believe, had no interest or claim in and to said tract, or any part thereof; and that the heir-at-law of said James P. Hudson, deceased, is not a citizen of the State of Texas.

Yet your orators aver that, although they were in possession of said tract, having title thereto as aforesaid, said John H. Herndon and Samuel A. Maverick, they being the only ones of the original defendants as to whom the original bill of complaint of your orators has not been abated as aforesaid, by death, or else stands taken pro confesso, together with one Francis Wurzbach, who is a citizen of the State of Texas, have, contrary to equity and good conscience, cast a cloud upon the title of your orators, and have endeavored to subject them to harrassing and vexatious litigation, and to cause them to be involved in a multiplicity of suits at law by their actings and doings, as hereinafter set forth. And they aver that said Herndon and Maverick, for the purpose of wronging and injuring your orators in the premises, and well knowing what is herein alleged, have, jointly or separately, in their own names, and in the names of others, made, and caused to be made, locations and surveys on large portions of said tract, by virtue of certificates or warrants, or other rights to location, issued and acquired under the laws of the republic and State of Texas; but whether they, or either of them, have obtained patents upon their said surveys your orators are not informed; and by virtue of said locations, surveys, and patents, if
50 obtained, said parties pretend that they have obtained a right to so much of said tract as may be covered by said locations, surveys, and patents, if obtained. And said parties have also bought and obtained from persons having similar claims to their own other portions of said tract. And your orators aver that said Francis Wurzbach, pendente lite, and with full knowledge of what is herein stated, likewise bought and obtained conveyance for a similar claim to a portion of said tract. And your orators aver that, although said defendants Herndon, Maverick, and Wurzbach, well knew that said locations, surveys, and patents, if obtained, together with their said purchases of similar claims, were void and of none effect, and formed a cloud upon the title of your orators, and would force them to become involved in a multiplicity of suits, still, in order to harrass and further wrong your orators, they sold and conveyed, and bound themselves to sell and convey, to divers persons, to your orators unknown, pendente lite, divers parts of the portions of said tract respectively claimed by them as aforesaid; all of which is contrary to equity and good conscience. Yet your orators, inasmuch as those under whom they claim had good title and were in actual occupation of said tract, and as they had and have good equitable title thereto,

and are in actual occupation thereof, had well hoped that they would have continued and remained in such occupation and possession undisturbed, without litigation, without any cloud upon their title, and without the necessity of harrassing and vexatious litigation as to the same. But now, so it is, may it please your honor, that the said defendants, combining and confederating together, and with divers other per-
51 sons, at present unknown to your orators, but whose names, when discovered, your orators pray they may be at liberty herein to insert, and make parties defendants hereto, with proper and apt words to charge them, and contriving how to wrong and injure your orators in the premises, have, when requested to act in accordance with equity and good conscience as to your orators, absolutely refused, and still continue to refuse to comply with such requests. And the said heirs of the said John McMullen sometimes pretend that the allegations herein before made touching them are not well founded, and that they ought not to convey the legal title to said tract to your orators. Whereas your orators charge the direct contrary thereof to be the truth, and charge that said instrument is good and valid as an equitable title, and that inasmuch as said Richard A., Amelia L., and Russell Howard have conveyed to your orators, that your orators are entitled to have the legal title to said tract, conveyed to them by said heirs, in accordance with the effect of said instrument executed as aforesaid by their ancestor, said John McMullen, deceased. And the other defendants, said Herndon, Maverick, and Wurzbach, sometimes pretend that the government of Spain did not grant said tract of land unto said Indians, but gave them only a beneficiary interest or use therein, and that the grant made by said government has been revoked or annulled; that such revocation or annulment was valid without *office* found; and that said tract, though once appropriated and tilled, by means thereof became a part of the public domain, and became subject to location, survey, and patent; that they had no notice that said tract was not vacant and patent-
able land, and that your orators are unable to deraign their title,
52 as has been hereinbefore set forth, from said Indians. Whereas your orators charge the direct contrary thereof to be the truth; and further charge that said last-named defendants at other times give out and pretend that they are unable to give an accurate statement of the various portions of said tract that they have bought or located, or caused to be surveyed and patented, or that having claim to, they have sold and conveyed; and assert that all their actings and doings touching the same are of record, and hence ought not to be discovered by them, and pretend at the same time to be wholly ignorant of what is manifest of record, touching the title of your orators, as is hereinbefore stated. Whereas your orators charge the direct contrary thereof to be the truth. And your orators further charge that there are now in the separate possession of each of defendants, or under their control, some writings having relation to, or making allusion to, the matters in question, or some one or more of them, whereby the truth of the statements and charges aforesaid, or some of them, would clearly and fully appear. And your orators here seek from each of said defendants description and full particulars, well arranged, so as to form an intelligible schedule, with all proper dates and descriptions therein distinctly set forth, so that the parties and matters alluded to by the contents of said schedule may be plainly and succinctly manifest. To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed; and may, upon their several and respective corporal oaths, and according to the best and utmost of their

several and respective knowledge, remembrance, information, and belief, full and direct and proper answer make to such of the
53 several interrogatories hereinafter mentioned and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

Interrogatories subjoined.

1. Whether the allegations in the stating part hereof touching the heirs-at-law of said John McMullin, deceased, are true in each and every particular; and if nay, wherein are they otherwise?

2. Whether each of the defendants has not in his own name located, and when, caused to be surveyed, and when, caused to be patented, and when, any and what portions of said tract; describing them particularly, and stating the number of acres?

3. Whether each of defendants has not in the name of any, and what, other person or persons, caused to be surveyed, and when, on locations, and when made, caused to be patented, and when, any, and what portions of said tract; describing the same particularly, and stating the number of acres?

4. Whether each of said defendants has purchased, and when, from whom, and how much, any and what portions of tracts located within the limits of said tract; whether they have sold, and when, to whom, how much, and for what consideration, any and what portions of the several tracts claimed by them and situate within the limits of said tract?

5. Whether each of said defendants has claimed, or now claims, and by what title, any and what portions of land situate within the limits of the tract claimed by your orators, as in the original bill set forth?

6. Whether any and what other locations have been made upon said tract by any and what other persons, with or without the
54 example or advice of defendants, or some of them, stating particularly why they were so made?

7. Whether each of the several allegations in the charging part of this bill is not true, and if nay, wherein, in each and every particular is it otherwise?

And your orators praying that said heirs-at-law of John McMullen, deceased, may be decreed to convey the legal title to said tract unto them, and that your honor may provide by your decree that the legal title aforesaid be divested from said heirs and vested in your orators, pray as in the said original bill.

May it please your honor to grant unto your orators the United States writ of subpœna, directed to said Francis Wurzbach alone, (said defendants Herndon and Maverick having appeared by an agreement on file) commanding him to be and appear in this honorable court, in the time and manner prescribed by the rules governing the same; and further, to stand to, and perform, and abide such further order, direction, and decree therein as to your honor shall seem meet. And that said defendant, Francis Wurzbach, upon being served, &c., may be bound by all the proceedings in this cause. And your orators shall ever pray.

ALEXANDER, *Solicitor for Complainants.*

CITY OF AUSTIN, *June 29th*, 1860.

NOTE.—The defendants, the heirs-at-law of said John McMullen, deceased, are required to answer the interrogatory numbered 1. The de-

fendant Francis Wurzbach is required to answer the interrogatories numbered 4, 5, and 7.

The defendants John H. Herndon and Samuel A. Maverick are required to answer the interrogatories numbered 2, 3, 4, 5, 6
55 and 7.

ALEXANDER.

The words "against" on page one, and the word "title" on page 6, interlined before signing; an erasure or crossing out of same words repeated on page 9, is also noted before signing.

ALEXANDER.

And afterwards the following entry appears upon the rule-book of this court, to wit:

Pro confesso.—Entered at Oct. rules 1860, *against Maverick & Herndon.*

Rule taking bill pro confesso. October rules, 1860.

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } 10. Chanc'y.

The defendants Maverick and Herndon, having failed to answer the bill in compliance with the order granting further time at the June term, 1860, and the time to answer having expired, the complainants take their bill, as them and other defendants duly subpœnaed, &c., as confessed.

R. A. ALEXANDER,
Solicitor for Complainants.

Entered Oct. 1, 1860.

M. HOPKINS, *Clerk.*

And the following entry appears upon the rule-book of this court, to wit:

Motion for reference to master and for decree.—En'd Nov. 5, 1860.

Motion for entry of judg't pro conf. and for reference to the master. November 5, 1860.

THE HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } No. 10. In chancery.

56 In the above-entitled and numbered cause the complainants, by their solicitor, move the court that, so soon as the said cause may be reached in the call of the chancery docket at next term, a decree be entered in their favor on their supplemental bill, &c., as taken pro confesso at last rule-day, and on the answer of the heirs of John McMullen, deceased, which, by agreement of counsel, is to be filed in this cause as of this day; and that this honorable court do then order in said decree that reference be made to a master, or that defendants Herndon and Maverick be required to answer interrogatories to be filed against the by complainants touching the matters sought to be discovered by co plainants, so that all the facts essential to the rendition of a final dec

be ascertained; and that such further orders may then be made as said cause may require, and as to equity may seem meet.

ALEXANDER,
Solicitor for Complainant.

NOVEMBER *5th*, 1860.

Attest:

M. HOPKINS, *Clerk.*

The following motion appears upon the rule-book of this court, to wit:

Motion of d'f't Herndon to set aside pro confesso.—Filed Jan'y 11, 1861.

Motion by Herndon to set aside jud't at rules pro confesso. Motion filed January 11th, 1861. Friday, Jan'y 11th, 1861.

BAINBRIDGE D. HOWARD'S HEIRS
vs.
ARCHIBALD HODGE ET AL.
} No. 10. Chancery docket. Motion.

And now, at this time, comes John H. Herndon, one of the defendants in the above-entitled cause, and moves the court to vacate and
57 set aside the order entered on the rule-day of September last, taking complainant's bill pro confesso, for the causes following, to wit: As this defendant is informed, said order was irregular, having been taken on a bill not sworn to, when the object of said bill was to seek a discovery, wherefore, as this defendant is advised it was irregular to take as pro confesso such portions of the bill as sought discovery.

And further, defendant says that he was in Austin, in the spring of 1860, when complainant's counsel agreed to set aside the order taking his original bill as pro confesso on terms. That defendant was travelling through the country till about the time the order was rendered for extending the time to answer, and that the supplemental bill was not filed till thereafter, nor was this defendant informed of the terms upon which the time to answer had been extended, nor as to the time when the supplemental bill had been filed, nor of the contents thereof. That, if the counsel of defendant communicated this information to him, which is not known, he being now absent from the State, owing to the irregularity of the mails, he did not receive the information. That, even if defendant had been advised as to the contents of the supplemental bill and of the necessity of answering the same on or before the third rule-day, thereafter, he could not have done so, as this defendant was residing at Velasco, in Texas, about two hundred miles from the city of Austin, where it was necessary the bill should be answered, and from early in July until long after the rule-day in September had passed, he had much and constant sickness in his family, in consequence of which he would have been unable to leave home to prepare his answer.
58 That, if this defendant be required to answer the several interrogations propounded to him in the supplemental bill, which, however he does not admit, then he says he could not have answered said bill at all without the aid and assistance of his counsel, and until he had examined the maps and records of the gen'l land office at Austin, or the maps and records of the land office at San Antonio, both of which places were some two hundred miles from where he was confined, by reason of the sickness of his family. And this defendant is also advised and believes that it would have been necessary to have examined

the records of Medina County before answering the compainant's bill, and that the said Medina County is still more distant from the place where defendant was residing.

JNO H. HERNDON.

Sworn to and subscribed to before me this Jan'y 11th, 1861.
MATTHEW HOPKINS,
United States Commissioner.

Filed Jan'y 11th, 1861.
MATTHEW HOPKINS, *Clerk.*

And afterwards, to wit, on the 15th day of January, A. D. 1861, the following entry appears upon the rule-book of this court, to wit:

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD MCMULLEN ET. AL. } 10. Chancery.

JAN'Y 15*th*, 1861.

And now come the heirs of McMullen and file their answer to the supplemental bill.

M. HOPKINS, *Clerk.*

59 And it appears from the papers of the cause that the heirs of McMullen, by their solicitor, Jacob Waelder, filed their answer in words to wit:

Answer of heirs of McMullen.—Filed January 15th, 1861.

Answer of McMullen's heirs. Filed January 15, 1861.
M. HOPKINS, *Clerk.*

THE HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET ALS. } No. 10.

The answer of John McMullen, Anthony McMullen, James McMullen, Neal McMullen, Ann McMullen, Morris Egan, and Margaret Egan, wife of said Morris, late Margaret McMullen, deceased, to the supplemental bill in the nature of a bill of revivor of the heirs of Bainbridge D. Howard, complainants; and these defendents, voluntarily appearing and submitting to the jurisdiction of the court, say that they are informed and verily believe and hence admit that the allegations of said bill are true.

JACOB WAELDER,
Att'y for above named Defendants.

Filed Jan'y 15, 1861.
M. HOPKINS, *Clerk.*

And afterwards the following order was filed, and appears in the papers of the cause, to wit:

Order of court on motions of complainant & def't Herndon.—Filed Jan'y , 1861.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL.

On hearing the motion made in behalf of defendant Herndon in connection with the motion entered at November rules in behalf of complainants, it is ordered that a decree be entered in their favor against all the defendants except J. H. Herndon, and reference be made to a master, &c., as prayed for in complainants' said motion, &c.; and
60 that as to said defendant John H. Herndon, the order taking the bill pro confesso as to him be set aside, and that he have until the rule-day in March next to answer the bill, on condition that he pay all the costs of plaintiff in this case.

T. H. DUVAL.

And the following entry appears upon the chancery minutes of this court, to wit:

Entry of order.—Minutes Janu'ry 30, 1861.

Order setting aside judg't pro conf. as to Hrendon upon terms, and confirming same as to Maverick, and referring to the master.

WEDNESDAY, *January* 30, 1861.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } No. 10. Chancery.

On hearing of the motion made in behalf of defendant John H. Herndon, together with the motion entered in behalf of complainants at November rules, it is ordered that the motion of defendant Herndon be sustained; that the decree entered pro confesso as against him be set aside; and that he have time extended to him to file his answer in this cause until the rule-day in March next, upon condition that he shall pay all the costs of the complainants in this case, for which execution may issue upon this decree as upon a judgment at law. It is further decreed that said decree taking the supplemental bill, &c., of complainants pro confesso be confirmed and made final as to defendant Samuel A. Maverick; and that complainants, to wit, said heirs of Bainbridge D. Howard, deceased, have and recover of said Maverick the tract of land in the original bill described; and that their title to the same be, and is
61 hereby, decreed to be free from all clouds cast thereupon by said Maverick, and all persons claiming by, through, or under him; and that the patents, locations, and surveys obtained by said Maverick in conflict with the title of complainants, which is decreed to be good title, are, and are hereby, adjudicated to be null and void.

It is further decreed that a reference is hereby ordered to be made to Matthew Hopkins, esq., as master in chancery, to ascertain and report to this court, at an early day as practicable, all the material facts sought to be discovered by said complainants as against said defendant; and that he is empowered to examine said defendant on oath, by interroga-

tories to him addressed to that end, in order that such additional decree to this final decree may hereafter be entered as to equity may seem meet, said defendant being adjudged to pay all the costs of this cause heretofore incurred either by or about him, and all the further costs thereof, for which execution may issue as to so much thereof as have already accrued, as at law, after the adjournment of this term, and for the residue after the next term of this court.

It is further decreed that the bill, &c., of complainants be dismissed without prejudice as to defendant Wurzbach.

It is further decreed that the legal title to the land in said bill, &c., of complainants described be, and is hereby, decreed to be vested in complainants as against the heirs-at-law of John McMullen, deceased, they having answered and submitting to the jurisdiction of the court, admitted all the material facts alleged against them.

And afterwards the following entry appears upon the rule-book of this court, to wit, March rules, Mar. 4th, 1861.

62 *Entry rules.—March* 4, 1861.

HEIRS BAINBRDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } No. 10. Entry rules.

Now comes the defendant John H. Herndon and files his answer.

G. W. PASCHAL, *pro Def't.*

MATTHEW HOPKINS, *Clerk.*

And on the same day, to wit, March 4th, 1861, J. H. Herndon, by his solicitor, filed his answer, endorsed as follows, to wit: "Heirs of Bainbridge D. Howard vs. J. H. Herndon. Answer of J. H. Herndon. Filed March 4th, 1861. M. Hopkins, clerk." And which is in words &c., as follows, to wit:

Answer of John H. Herndon.—Filed March 4, 1861.

Answer of J. H. Herndon.

UNITED STATES OF AMERICA:

In the district court of the United States for the western district of Texas, at Austin.

The separate answer of John H. Herndon to the bill in chancery and the bill of revivor, exhibited against this defendant in the case of Bainbridge D. Howard, complainant, against Archibald Hodge and others, defendants, in the district court of the United States aforesaid.

This defendant, John H. Herndon, now, and at all times hereafter, saving and reserving to himself all manner of benefit and exception to the manifold errors, insufficiencies, inconsistences, contradictions, im-
63 pertinences, and want of equity in the bill of complainant contained, for answer thereto, or to so much thereof as he is advised and believes it is necessary for him to answer unto, answering, says:

That, as to the charge that, on or about the twenty-second day of November, in the year seventeen hundred and seventy-six, the govern-

ment of Spain, according to the forms of law, and by the regularly constituted officers of government, granted to the Indians of the population of the Mission of San José, a certain tract or parcel of land of the description, calls, and boundaries in the complainants' bill of complaint set forth, this defendant knows nothing of his own knowledge, information, or belief, and he requires strict proof of the same, and as to the boundaries, or localities of the pretended grant, this defendant knows nothing, and requires strict proof thereof.

And further, this defendant says, that if ever any such grant was made, which is not admitted, but denied, he is informed and believes that the same was not a grant to the soil in fee, but a mere usufructory right, or right to occupancy, by certain Indians, for their use, so long as they were identified with the Mission of San José, which right of
64 occupancy has long since expired and reverted to the government, so that there is not now, nor was there ever, any pretence of legal title in the said Indians, or any of them, or any descendant of theirs, which they could lawfully convey or transmit to any other person; that, in fact, no one of the Indians of said mission ever had a legal & transmissable estate in said land, wherefore this defendant denies that there ever was any said legal and valid title to the land described in the bill, or any other land, in conflict with any right of this defendant. And as to any regular chain of complete conveyances in fee, from the said Indians then entitled to those, or him under whom the complainant claims, of all the right, title, and interest of the said Indians in and to the said land described in said bill, whereby the title was duly vested in said complainant, so that he was seized and possessed of the same in fee, this defendant knows nothing, and thinks it impossible in law that it can be true; and this defendant requires strict proof of the same.

And this defendant denies that the complainant and those under whom he claims, is or were in possession of said land at the
65 commencement of the suit. And this defendant denies that he has combined or confederated with the other defendants named, or with any other person, to cheat or defraud the complainant, or to make locations upon the land described in the complainant's bill, nor has this defendant, jointly with the other defendants, or separately for himself, so far as he knows or believes, made locations upon the lands so described, by virtue of warrants, certificates, &c., and certainly this defendant has not disturbed the seizin or possession of the complainant, for he never had any.

But, if this defendant has any locations, surveys, or patents in conflict with the lands in the complainant's bill described, (which is not admitted, but denied,) then this defendant says that they are legal and valid, and upon lands heretofore vacant; and that he and those claiming under him, hold the same by long-continued possession, and by valid adverse title; and therefore, if the complainant has any cause of action, it is strictly in a court of common law, and this defendant will insist that this court has no jurisdiction of said cause and will insist upon it as upon demurrer.

And in answer to the first special interrogatory, this defendant
66 says that he does not know the boundaries set forth in the complainant's bill, and therefore, he cannot say whether or not he has any locations, surveys, or patents within the boundaries of said pretended grant; if he has. his titles have been perfected into patents, the records whereof are in the General Land Office, and where he holds by derivative title the records thereof are in the county clerk's office of Medina & Bexar

counties, and the field-notes of surveys are in the district surveyor's office, of the Bexar land district; and from these records the complainants can as well judge of the question of conflict as this defendant; if a conflict there be, this defendant will produce the evidences of his title at the hearing.

In answer to the second interrogatory, this defendant connot say whether he has any locations, or how much, within the boundaries set up in the complanant's bill, as he cannot tell what boundaries or lands the pretended grant covers, if indeed there be a grant.

Third. This defendant cannot answer for either of the other defendants.

Fourth. This defendant knew nothing of the locations & surveys of strangers to the bill, & if he did, he insists that he is not bound to answer such a fishing question.

67 And as to the matter and things set forth in the bill of revivor, this defendant says that personally he knows nothing of the life or death of the complainant, Bainbridge D. Howard, nor whether he died childless or not; though he has understood that his widow had a posthumous child, born after the death of said Bainbridge D. Howard, and he will require strict proof that he died childless.

And as to the conveyances described in said bill of revivor, this defendant knows nothing.

He has already denied the of mesne conveyances, and will require strict proof thereof.

This defendant further answers and says that, as to whether John McMullen did, on the fifth day of November, A. D. 1849, or at any other time, execute an instrument or covenant in writing, by him signed, but which was not sealed and witnessed by two witnesses, so as to take effect as a deed unto said Bainbridge D. Howard, this defendant knows nothing. But this complainant insists that any such instrument was void, as well for the reasons set forth by the complainants themselves, as, because this defendant is informed and believes, and therefore

68 charges, that if any such unsealed, pretended act was made it was a fraudulent and void contrivance on the part of John McMullen, to give jurisdiction to the Federal court, when the said McMullen and all the other defendants were citizens of Texas; and after said McMullen had sued the defendants named in the original bill in the district court of the county of Bexar, in the State of Texas; in which suit, on the day of A. D. 1847, a judgment had been rendered in favor of the defendant, Archibald Hodges, from which judgment the said McMullen appealed, and, on the day of A. D. 1848, the judgment of the district court, declaring the pretended grant void, was affirmed; after which the complainant dismissed his suit as to the other defendants; and then, to try to give jurisdiction to the Federal court, the said McMullen combined and connived with said Volney E. Howard, one of the complainants in the bill of revivor, to bring the suit in the name of the said Bainbridge D. Howard, without any conveyance having been paid to said Bainbridge, and without his having paid one dollar therefor; but the whole was a beneficial arrangement for said McMullen

69 and Volney E. Howard, who was to have a large part of the land for his services, and who was thus, at the commencement of the suit, a citizen of Texas, as was also the said John McMullin, so that, in truth and in fact, this court had not, nor has it now, any jurisdiction of the subject-matter, but the attempted jurisdiction was and is a fraud, as this defendant will prove at the hearing. This defendant denies that ever the said Bainbridge D. Howard had any legal title or

valid equitable title in and to said land, and therefore, at the time of the commencement of the suit the Federal court had no jurisdiction of the cause.

This defendant here again denies the grant and the validity thereof, and of the pretended mesne conveyances, and particularly and specially he denies the legal heirship and right of those Indians who pretended heirship and right of inheritance.

And now, because the complainants, on the face of their supplemental bill, set forth and show that the said John McMullen did, by deed, convey to said Bainbridge D. Howard, and that the heirs of John McMullen never have conveyed the legal title to said Bainbridge D. Howard; this defendant will insist as if upon demurrer, that the said Bainbridge D. Howard never had any title to the land, and and therefore
70 there is no equity in the complainants' bill of complaint. This defendant believes that the other material averments in the supplemental bill, as to this defendant, have been answered in the answer to the original bill.

He insists that the complainants never had possession of said land, and therefore there is no equity in the bill.

And, in answer to the first interrogatory in the supplemental bill, this defendant says that he knows nothing touching the heirs of John McMullen refusing to execute title to the complainant, nor, indeed, who McMullen's heirs are; but, as the bill shows that the legal title is in them, it is very apparent that they are necessary parties, without whom the bill must be dismissed.

In answer to the second interrogatory, this defendant says that he does not know the boundaries claimed by the complainants, and therefore, can give no further answer about his own titles or any pretended conflict.

He gives the same answer to the third fishing interrogatory.

In answer to the fourth interrogatory, this defendant gives the same answer, for the same reasons, and he insists that he is not bound further to answer the same.

This defendant is obliged to give the same answer to the fifth interrogatory, and to insist that he has nothing to do with the locations and titles of the other defendants.

In answer to the seventh interrogatory, this defendant cannot say that each of the allegations in the charging part of the bill are true. On the contrary, he denies the existence and legality of the grant,
71 and insists that the supreme court of Texas has judicially determined that it is invalid and confers no title. He denies the mesne conveyances, and particularly, that ever McMullen had title, or that he ever conveyed any legal title to Bainbridge D. Howard. He denies that the complainants are the heirs of Bainbridge D. Howard, and will insist upon strict proof of it.

Without this, that there is any other matter or thing in the complainant's said bill of complaint not herein admitted, traversed, or denied is true. And this defendant having fully answered, prays to be hence dismissed with costs.

J. A. & G. W. PASCHAL,
Sol. pro. Compl't, Jno. H. Herndon.

UNITED STATES OF AMERICA, *District of Texas:*

Before the undersigned, chief justice of the county court of Brazoria County, personally appeared John H. Herndon, who, on oath says that the matters and things set forth in the foregoing answer, so far as stated

on his own information, knowledge, and belief, are true; and so far as stated on the knowledge, information, or belief of any other person, he believes them to be true,

In testimony whereof I hereunto sign my name and affix the seal of the county court this 26th February, A. D. 1861.

S. W. PERKINS,
Chief Justice of the County Court of Brazoria County.

The following entry appears upon the rule-book of this court, to wit:

At March rule-day, 1861.

72 *Entry rules, March* 4, 1861, *pro confesso against Herndon.—Filed March* 4, 1861

HEIRS OF BAINBRIDGE D. HOWARD *vs.* J. H. HERNDON ET AL. } No. 10. In ch'ry.

In this cause, it being apparent that the defendant, John H. Herndon, has not performed the condition precedent to his being permitted to file an answer, imposed upon him by the order of this court at its last term, and that said defendant has not filed any sufficient and sworn answer prior to this day, as he might have done had he complied with said order, complainants, by their solicitor, enter their order, taking their supplemental bill, bill, and other pleadings for confessed as against him, said defendant, and filed it; at the same time, without waiving any ground taken in this order at rules, file their motion of course against said defendant, touching a paper purporting to be an answer improvidently filed this day.

ALEXANDER,
Solicitor for Compl'ts.

The following entry appears upon the rule-book of this court, to wit:

Motion of complainant to strike from files answer of J H Herndon.—Ent'd March 4, 1861.

Motion to strike Herndon's answer from the files.—March rules, M'ch 4, 1861.

HEIRS BAINBRIDGE D. HOWARD *vs.* JOHN H. HERNDON, &C. } In ch'y. No. 10.

In this case the complainants by their solicitor, move the court as of course to, that a paper, improvidently marked, filed on this day, (March 4th, 1861,) be stricken from the files at the cost of the defendant, John H. Herndon, whose answer it purports to be, for the following causes, to wit:

1st. Because said defendant Herndon is in contempt, in this, that
73 he has not paid all the costs decreed against him as a condition precedent to his being permitted to answer at all; that he failed to file any answer within the limit assigned him, which was until this day; that he has committed a further contempt by filing a paper purporting to be an answer, without notice, leave, or performance of any

one of the conditions precedent imposed upon him after a second pro confesso by the court.

2d. Because said paper, purporting to be an answer, has no sufficient jurat or affidavit appended thereto, and is not sworn to before a competent officer.

3d. Because of other grounds apparent from said paper when considered in reference to the papers and records of this cause, as well as for causes manifest on the face thereof, which show it to be a nullity.

ALEXANDER,
Solicitor for Complainants.

MARCH 4, 1861.

And afterwards, the following decree appears upon the chancery minutes of this court, to wit:

Decretal order.—Ent'r'd June 20th, 1866.

Circuit court of the United States for the western district of Texas, in chancery sitting. June term, 1866.

WEDNESDAY, *June 20th*, 1866.

The court met pursuant to adjournment, when the following proceedings were had:

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } In chancery. No. 10.

On hearing of the motion of the solicitor for the complainants in this cause, filed March 4th, 1861, to strike the answer of the defendant
74 John H. Herndon, from the files, he being in contempt for the cause therein set forth, it is ordered that the same be, and is hereby, sustained, and that said answer is ordered to be stricken from the files accordingly. On motion of sol'r for compl'ts, it is further ordered that the order taken at rules on the fourth day of March, A. D. 1861, taking the supplemental bill and other pleadings of complainants for confessed, be confirmed and made final as to the said defendant John H. Herndon. And whereas, on the 30th day of January, A. D. 1861, a final decree of the dist. court of the United States for the western dist. of Texas, sitting in chancery, was entered against Sam'l A. Maverick, one of the co-defendants in this suit, and since that time the jurisdiction of said court has been changed by law, and said cause is now pending in the circuit court of the United States for the west. dist. Texas, sitting at Austin, it is hereby, on the final hearing of said cause, on the pleadings, orders, and proofs submitted therein, ordered, adjudged, and decreed that the complainints Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. (formerly Howard,) his wife; Ephraim H. Lombard and Julia A., (formerly Howard,) his wife; and Mehitabel Howard, who are the heirs-at-law of Bainbridge D. Howard, dec'd, have and recover of said Samuel A. Maverick and John H. Herndon the tract of land in the original bill of complaint described, and that their title to the same is hereby decreed to be free from all clouds cast thereon by said defendants, and all persons claiming or to claim by, through, or under them. Said tract of land is described as follows, to wit: A certain tract or parcel of land, on or about the
75 22d day of November, A. D. 1766, granted by the gov't of Spain, according to the forms of law, to the Indians of the Mission of San José, and by them conveyed to John McMullen, since dec'd, beginning on the top of Padron Hill; thence running, from the north to

the south, to the creek called the Alamos, at the crossing thereof, where there was placed a land-mark near the road leading to the presidio of the Rio Grande; thence along the road westwardly, to the arroyo or creek Palahina, where there was placed a land-mark; thence turning towards the north to the road that comes from the cañon to the Loma Alto, where was placed a land-mark by piling stones a short distance from the land-mark of Baltazar Perez, an adjoining proprietor; thence following an east course to the said Padron Hill, to the place of beginning, said tract lying in the counties of Bexar and Medina, in the State of Texas, and being now commonly known as the pasture land of the Mission of San José.

It is further ordered and decreed that all patents, locations, and surveys, obtained or owned by said defendants Maverick and Herndon, which are in conflict with the title of complainants, which is decreed to be a good title, are, and are hereby adjudicated to be, null and void, and that said defendants shall cancel and remove the same. It is further decreed that a reference is hereby ordered to be made to Matthew Hopkins, esq., as master in chancery in this court, to ascertain and report to this court at as early a day as may be practicable, all the material facts sought to be discovered by said complainants as against the
76 defendants aforementioned, and that he be empowered, if necessary, to examine said defendants on oath by interrogatories addressed to them, to the end that such additional decree may hereafter entered herein as to equity may seem meet. Said defendants being adjudged to pay all the costs of this cause incurred and to be incurred in consequence of this decree, for which, so far as already incurred, execution may issue as at law after the adjournment of this term, and as to the residue after the adjournment of the term or terms prior to and during which they may accrue.

It is further decreed that the bill of complaint be dismissed without prejudice as to defendant Wurzback. It is further decreed that the legal title to said tract of land in the original bill described be, and is hereby, decreed to be vested in the complainants, and that said master in chancery shall, as commissioner of this court, make, execute, and cause to be duly recorded, a deed conveying the legal title thereof from John McMullen, Anthony McMullen, James McMullen, Neil McMullen, Ann McMullen, Morris Egan and Margaret, (late Margaret McMullen,) his wife, the heirs-at-law of John McMullen, dec'd, to complainants, the said heirs-at-law having answered and submitted to the jurisdiction of this court, and admitted all the material facts alleged against them.

And afterwards, to wit, on the 3d day of December, A. D. 1866, Matthew Hopkins, master in chancery, filed his report, which is in words as follows, to wit:

77 *Master's report.*

B. D. HOWARD'S HEIRS
vs.
HODGE ET AL. } In chancery. No. 10.

In the circuit court of the United States, sitting in equity, at Austin, in the west. district of Texas.

Matthew Hopkins, who has been duly appointed and qualified as master in chancery of the circuit court of the United States, sitting in equity, at Austin, in the western district of Texas, to whom a reference was made by a final decree of said court, in the suit of Bainbridge D. Howard's Heirs vs. Hodge et al., in chancery No. 10, at the June term of said court, in A. D. 1866, directing him to ascertain and report at as early

a day as might be practicable all the material facts sought to be discovered by the complainants in said suit against the defendants Samuel A. Maverick and John H. Herndon, respectfully submits and files this his report.

Premising that, since said reference was made to him, owing to having had to submit to a painful and hazardous surgical operation, and to the prevalence of the Asiatic cholera as an epidemic in Bexar and Medina, in which the land in controversy is situate, together with various other causes, he has not had it in his power to visit said counties in person, and to search and examine the records thereof, and to examine said Maverick, who resides in Bexar County, upon oath. He further states that he is informed, and verily believes, and therefore reports that since said decree was entered, said Maverick and Herndon have not
78 been in Travis County, and that for some part of the time said Herndon has been without the limits of the State of Texas. He also states that neither of said defendants has paid, or caused to be paid, the costs adjudged against him in this suit.

After having examined such official statements and documents as have been prepared for him by the commissioner of the general land office of the State of Texas, and the comptroller, together with certain abstracts of the records of said counties, which are corroborated by said official statements and the papers of said suit, he reports that the defendant Maverick appears to have claimed to be the owner of the following-described tracts of land, situate within the limits of the pasture lands of the Mission of San José, as described in said decree, which are some time known as the San Lucas lands, to wit:

No. of survey.	Original grantee.	No. of acres.	Remarks.
17	Francisco Seal	4,605	
16	Rafael Garza	Either ½ l. or 708	Patented to **Maverick**, as ass'ee.
15	Anto. Chavaris	2,302	S. A. **Maverick**, ass'ee, not pat'd.
10	Gaspar Flores	4,605	" " patented.
396		960	

He further reports that the defendant Herndon appears to have claimed to be the owner of the following-described tracts of land,
79 situate within the limits of the land in said suit, described in said decree, to wit:

No. of survey.	Original grantee.	No. of acres.	Remarks.
1	James Cammell	4,605	The defendant Herndon, in his sworn answer, which, though stricken from the file, is good as an affidavit, admitted that he owned the tracts marked *; als' a tract for John H. Pilkin, viz: 1 L. and L. not patented, while the others are, and disclaims as to the rest.
324	Bartel and Hodge	354	
47	A. Stafford	640	
2	J. Foster	2,302	
25	J. Thompson	4,444	
198	P. M. Hughes	738*	
42	J. E. Calder	2,952*	
65	" " "	6,476*	
4	J. Thompson	885*	
1039	" "	354	
41	J. Sharp	4,444	
196	W. R. Randle	624*	
14	S. H. Luckie	1,111*	
417408	J. Menmer	640	

The undersigned, for the causes hereinbefore stated, is unable to report more fully at this time, and has not been able to ascertain whether or no said Maverick and Herndon purchased and claimed, prior to or at the time of the institution of said suit, or acquired in any manner pendente lite in their own names or in the names of any other person or persons, any other tract or tracts of land situate within the limits aforesaid. The undersigned further reports that, in pursuance
80 to said decree, on the 3d day of December, A. D. 1866, he made a deed in triplicate, conveying all the title of the heirs of John McMullen, dec'd, to the tract of land herein described to the heirs of Bainbridge D. Howard, dec'd; two of the triplicate deeds to William Alexander, the solicitor of the said last-named heirs, who accepted the same in their behalf; said deed being herewith submitted, in order that, upon the confirmation of this report, of which it forms a part, it may be withdrawn and recorded in each of the counties aforesaid.

The several papers on file in this suit, together with a book of abstracts, with a tabular statement appended, verified by affidavit and by comparison, and certain official statements obtained from the commissioner of the general land office of the State of Texas, showing the locations and surveys that have been made and returned lying within the limits of the tract in suit, and certain statements obtained from the comptroller of the State of Texas, showing what is known officially in his office touching the giving in of a portion of them for taxes by the defendants Maverick and Herndon, together with the title-bond of John McMullen, dec'd, constitute the basis upon which this report is made, the unfiled documents having been by me marked "examined and identified," and numbered from 1 to 6, inclusive. This report has been made exclusively upon the facts developed by said papers and documents, no party having been summoned or notified to appear before me; the solicitor of the complainants having waived notice and the defendants being in actual as well as constructive contempt, having failed to an-
81 swer and to comply with the orders of the court previously made, not being entitled to notice. The cost of this report is taxed at ($500.00,) five hundred dollars, which the master submits is within the fee of any respectable attorney, if called to render the same services; the cost of suit being additional, as will appear by the bill of costs to be filed in this suit before the next rule-day. All of which is respectfully submitted.

MATTHEW HOPKINS,
Master in Chancery, &c., and Commissioner.

Filed this 3d December, 1866.

MATTHEW HOPKINS, *Clerk.*

And on the same day, to wit, December 3d, 1866, the following deed was filed, to wit:

Master's deed.—Filed Dec. 3, 1866.

THE STATE OF TEXAS, *Travis County:*

Know all men by these presents that, whereas by virtue of a decree rendered by the honorable the circuit court of the United States, sitting in equity in the western district of Texes, at Austin, at its June term, A. D. 1866, a certified copy of which is hereto attached, and is referred to as a part hereof, I, Matthew Hopkins, was authorized, directed, and

empowered, as master in chancery and as commissioner of said court, to make, execute, and cause to be duly recorded a deed conveying the legal title of the tract of land therein described from John McMullen, Anthony McMullen, James McMullen, Neal McMullen, Ann McMullen, Morris Egan and Margaret, (formerly Margaret McMullen,) his wife, the same being the heirs-at-law of John McMullen, deceased, to Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H., (formerly Howard,) his wife, and Mehitabel
82 Howard, the heirs-at-law of Bainbridge D. Howard, deceased, in consideration of the premises, and for the further consideration of the sum of one dollar to me in hand paid by the heirs-at-law of said Bainbridge D. Howard, deceased, the receipt of which is hereby acknowledged, I, Matthew Hopkins, as master in chancery, &c., as aforesaid, have granted, bargained, sold, & conveyed, and by these presents, do grant, bargain, sell, convey, and confirm, all the right, title, interest, and claim which the aforesaid heirs-at-law of John McMullen, deceased, have or may have in and to the tract of land herinafter described, to the heirs-at-law of Bainbridge D. Howard, deceased; aforesaid tract of land being more particulary described as follows: "A certain tract or parcel of land, on or about the 22d day of November, A. D. 1766, granted by the government of Spain, according to the forms of law, to the Indians of the Mission of San José, and by them conveyed to John McMullen, since deceased, beginning on the top of Padron Hill; thence, running from the north to the south, to the creek called the Alamos, at the crossing thereof, where there was placed a land-mark near the road leading to the presidio of the Rio Grande; thence, along the road, westwardly, to the arroyo or creek Palahuia, where there was placed a land-mark; thence, turning towards the north to the road that comes from the cañon to the Loma Alta, where was placed a land-mark by piling stones a short distance from the land-mark of Balthazar Perez, an adjoining proprietor; thence, following an east course to the said Padron Hill, the place of beginning; "said tract lying in the counties of Bexar and Medina, in the State of Texas, and being now
83 commonly as the pasture land of the Mission San José: To have and to hold the same, together with all the rights and appurtenances thereto belonging, or in any wise appertaining, to them, the said heirs-at-law of Bainbridge D. Howard, deceased, and their heirs and assigns forever.

In witness whereof I have hereu'to, in my capacity as aforesaid, set my hand and affixed my scroll in lieu of seal, this first day of December, A. D. eighteen hundred and sixty-six.

(Done in triplicate.) MATTHEW HOPKINS [L. S.]
Master in Chancery.

Signed, sealed, and delivered in presence of the undersigned, each of whom is also a witness to the signature of the other—

BEN. WALKER.
J. M. BLACKWELL.

The decree attached is as follows; (being the same as found copied in this transcript, commencing on page 78;) and the following affidavit is on file among the papers of the case, to wit:

Affidavit of Pressler.

HOWARD'S HEIRS *vs.* HODGE ET AL. } In Chancery. No. 10. Pressler's affidavit.

This affiant, Charles W. Pressler, being first duly sworn, makes oath and says that the plat in triplicate of the pasture-lands of the Mission of San José, situate in the counties of Bexar, Atascosa, and Medina, in the State of Texas, and marked with the name of John McMullen, together with the plats of surveys included within, or partly so, or connected therewith, said plat, having its boundaries tinted yellow, and

[Folios 84, 85, 86, 87, 88, 89, and 90, original, missing from record.]

91 being signed by himself and countersigned by M. Hopkins, as master in chancery, is a true copy of the tract known as the John McMullen tract, as the same is delineated on the old map of the Bexar land district, which is on file in the general land office of the State of Texas, and that the smaller surveys on said plat are also true copies.

Affiant further states that, at this request of the solicitor for the complainants in the chancery suit of Howard's Heirs vs. Hodge et al, in ch'y No. 10, late pending in the circuit court of the United States for the western district of Texas, he has also platted out, in red, the Pita road, as given in certain field-notes alleged to have been made on a resurvey by John James; said road is in red, being different from that (in yellow) as found in the old map.

And further affiant saith not.

CHA'S W. PRESSLER.

AUSTIN, *Jan. 5th*, 1867.

Sworn and subscribed before me, this 5th January, A. D. 1867.

MATTHEW HOPKINS,
Master in Chancery.

92 The undersigned claims a fee of thirty dollars, (30.00,) for the plat & connections in triplicate; and one dollar & a half as witness—31.50.

CHA'S W. PRESSLER.

NOTE.—Execution issued Jan. 5th, 1867, on which is the following return:

"Not executed for want of time.

"A. P. BLOCKER, *Marshall.*"

And afterwards, to wit, on the 7th day of January, A. D. 1867, Mathew Hopkins, master in chancery, filed a supplemental report, which is as follows, to wit:

Supplemental report of master.—Filed Jan'y 7, 1867.

B. D. HOWARD'S HEIRS *vs.* A. HODGE ET AL. } In chancery. No. 10.

In the circuit court of the United States, sitting in equity, at Austin, in the western district of Texas.

Mathew Hopkins, who has been duly appointed & qualified as mas-

ter in chancery of the circuit court of the United States, sitting in equity, at Austin, in the western district of Texas, to whom a reference was made by a final decree of said court in the suit of Bainbridge D. Howard's Heirs vs. Hodge et al., in chancery, now at the June term of said court, in A. D. 1866, respectfully submits and files this his additional report, the same being additional and supplemental to his report filed on the third day of December, A. D. 1866.

93 At the line next the bottom line of the third page of said report, instead of "Bainbridge D. Howard, dec'd, two of the triplicate deeds," read "Bainbridge D. Howard, dec'd, and delivered two of the triplicate deeds," &c.

The master in chancery also reports that, in the month of April, in A. D. 1861, the defendant Herndon, paid in all fifty-six dollars and seventy-three cents, for which he is credited on the book of the clerk's office of this court. The payments made by said Herndon, amounting in all to the sum aforesaid, did not amount to a compliance with the order of this court, but would have been mentioned in said report had they not been casually overlooked. The defendant Maverick, has paid no part of the costs of this suit.

The master further reports that, having ascertained that the pasture-lands of this Mission of San José, which were conceded when Texas was a part of New Spain or Mexico, and which being for a long time in Bexar County, until the said county was subdivided, now lie in Bexar, Atascosa, and Medina counties. He has caused a plat of said pasture-

94 land to be made in triplicate, to be appended to and to form a part of the deed in triplicate mentioned and described in his original report; the boundary of said pasture-land being marked in yellow; the line platted in red, not being found on the map of Bexar land district on file in the general land office, is disregarded.

Said plat in triplicate, proven to be a true copy of the same as found on the old map of Bexar land district, on file in the general land office of the State of Texas, has been made on muslin and verified by the affidavit on file with the papers of this cause of Charles W. Pressler, late chief draughtsman of said land office, and each of the triplicates has been signed by him, and countersigned by the undersigned as master in chancery.

Fee taxed with the costs for Mr. Pressler for making said plat in triplicate, and for attendance, (31.50) thirty-one $\frac{50}{100}$ dollars.

MATHEW HOPKINS,
Master in Chancery.

And upon the chancery motion record the following entry appears, to wit:

Motion by the master.

B. D. HOWARD'S HEIRS *vs.* HODGE ET AL. } No. 10. In chancery.

95 In this case, in which a final decree was entered at the last term of this court and to whom, as masters & commissioner pro hac vice, certain matters were referred under said decree, refers to his report filed on December 3d, 1866, and also to his additional & supplemental report filed on January 7th, 1867, and to all the papers on file in suit, and also to all the papers, whether identified by his signa-

ture or not, that have been inspected and examined by the undersigned, in order to make up said reports, together with said reports, and moves the court to allow his reasonable costs, as the same have been taxed in said reports, by entering the following order, to wit:

In the United States circuit court.

B. D. HOWARD'S HEIRS
vs.
HODGE ET AL. } In chancery. No. 10.

In this case, in which a final decree was entered at the last term of this court, referring certain matters to Mathew Hopkins, as master in chancery and as commissioner pro hac vice, it appearing to the court that said Hopkins has filed and entered a report on December 3d, 1866, and an additional and supplemental report on January 7th, 1867, wherein certain costs have been taxed, and that said reports, not having been excepted to, stand confirmed under rule 83; yet that said Hop-
96 kins has submitted to the court that his compensation as claimed therein be allowed by the court in accordance with the provisions of rule 82, on inspection of the papers referred to in his motion and of the record in this suit it is ordered that his compensation, and the other costs as taxed by him in said report, be fixed and allowed as is therein stated and set forth.

It is further ordered that certified copies of said additional and supplemental reports be made out by said Hopkins in triplicate, and attached to the deed in triplicate heretofore made by him, together with certified copies of this order.

It is further ordered that the costs aforesaid be incorporated in such executions as may be issued.

All of which is respectfully submitted.

MATTHEW HOPKINS,
Late Master in Chancery & Com'r in above case.
Per ALEXANDER, *His Solicitor.*

And the following entry appears upon the chancery minutes of this court, to wit:

Order sustaining motion by the master.

B. D. HOWARD'S HEIRS
vs.
HODGE ET AL. } In chancery. No. 10.

In this case, in which a final decree was entered at the last term
97 of this court, referring certain matters to Mathew Hopkins, as master in chancery, & as commissioner pro hac vice, it appearing to the court that said Hopkins has filed and entered a report on Dec'r 3d, 1866, and an additional and supplemental report on January 7, 1867, wherein certain costs have been taxed, and that said reports not having been excepted to, stand confirmed under rule 83, yet that said Hopkins has submitted to the court that his compensation as claimed therein be allowed by the court in accordance with the provisions of rule 82, on inspection of the papers referred to in his motion, and of the record in this suit, it is ordered that his compensation and the other costs as taxed by him in said reports be fixed and allowed as therein stated

and set forth, except that the compensation for the original report is allowed to the extent of $250.00 and no more.

It is further ordered that certified copies of said additional and supplemental report be made out by said Hopkins in triplicate, and attached to the deed in triplicate heretofore made by him, together with certified copies of this order.

It is further ordered that the costs aforesaid be incorporated in such executions as may be issued.

Feb. 21, 1867.

(Signed) T. H. DUVAL, *U S Judge.*

2d execution.

The 2d execution issued in this cause having been returned unsatisfied, a third execution was issued as follows:

3d execution.

United States circuit court, western district of Texas.

Third execution.

98 The President of the United States of America to the marshal of the western district of Texas, greeting:

Whereas Volney E. Howard and others, the heirs-at-law of Bainbridge D. Howard, deceased, on the 20th day of June, A. D. 1866, and on the 21st day of February, in the year of our Lord eighteen hundred and sixty-seven, at our circuit court of the United States in and for the western district of Texas, have recovered against Samuel A. Maverick and John H. Herndon the sum of five hundred and eighty-two dollars eighty-nine cents, ($582.89) costs as taxed, as appears from a bill of costs hereto annexed, specifying said costs, and which, to the said Volney E. Howard and others, heirs-at-law as aforesaid, is now adjudged and decreed:

These are, therefore, to command you that, of the goods, chattels, and estates of the said Samuel A. Maverick and John H. Herndon, as you have been commanded, you cause to be made the full amount of this execution, together with legal fees and commissions for collecting the aforesaid amount, and that you have then this writ at the clerk's office of said court on the return day thereof, certifying how you have executed the same.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and seal of court, at Austin, this third day of June, A. D. 1867, and the ninetieth year of the independence of the United States.

[L. S.]

99 This execution is entitled to a credit of fifty-six $\frac{73}{100}$ dollars, ($56.73,) paid by John Herndon to me, and to W'm C. Young, marshal, in April, A. D. 1861, and is sent by instruction of William Alexander, late solicitor for complainants, to Russell Howard, esq., of San Antonio, Texas, the agent of the heirs of Bainbridge D. Howard, deceased, to be proceeded with as he may direct.

MATTHEW HOPKINS, *Clerk.*

Bill of costs, (attached.)

In U. S. circuit court, Austin. Chancery. No. 10.

BAINBRIDGE D. HOWARD'S HEIRS *vs.* ARCHIBALD HODGE ET AL. } Chancery. No. 10.

Clerk's orig'l bill of clerk's costs at Galveston				39 40
U. S. Marshal Bates:				
1851.				
May 24.	Feb. 21, mil., 4 sub's to San Antonio, at different times, 250 miles ea., @ 6		60 00	
	Furnishing four copies same, 50 L		2 00	
	Service, 4, 2.00		8 00	
				70 00
1856.	Total orig. costs at Galveston			109 40
Jan'y 10.	To fil'g, at Austin, 19 papers		1 90	
1858.	" docketing cause		67	
Feb. 9.	" motion, order, & ent'g		30	
Dec. 6.	" fil'g & certif. dismissal		25	
	" rules ent'g		15	
1859.				
Jan'y 1st.	To filing and certif. motion		25	
	" rules ent'g		30	
100 3.	" fil'g and certif. affidavit, 25c, and affidavit, 25		50	
Ja'y 29.	To fili'g and certif. bill to revive & ent'g		40	
Feb. 4.	" motion and order setting aside dismissal		30	
May 4.	" 12 orig. sub's and certif., $1.15		13 80	
" "	" 12 copies for service, fil'g certif., & ent'g ret's		11 25	
	" postage to eastern district		15	
Aug.	rules entry		15	
Sept. 22.	Filing certif. and ent'g returns, 4, 40		1 60	
	2 alias subp., & certif. & copies for same		3 00	
1860.				
June 25.	To fil'g & certif. agreement		25	
	" ent'g & docket order		30	
	" " order, &c		30	
29.	" " " "		30	
	" fil'g certif. supplemental bill		25	
1860.				
Oct. 1.	" ent'g pro confesso rules		30	
	Clerk's costs car'd forward		37 67	
	Total orig. costs at Galveston bro't for'd			109 40
	Clerk's costs at Austin bro't forw'd		37 67	
1860.				
Nov.	Ent'g rules setting down for hearing		30	
'61.				
Jan'y 15.	" filing 1 certif., answer McMullen's heirs		25	

15.	" ent'g rules	15		
30.	" ent'g decree	1 00		
	" docket fee, &c	2 00		
1861.				
	" fil'g, & certif. cost bill & ——g papers.	50		
Mar. 4.	" filing certif., and ent'g def'ts Herndon's answer	40		
	Rules comp't ent'g	50		
	Rules comp't "	50		
'66.				
June 20.	Ent'g motions, orders, & decree	1 50		
101 Dec. 3.	Entry record, rules, dec., rules & ent'g reports, &c	5 50		
	Filing and certifying sundry papers from master	1 00		
	Final record	50 00		
	Execution & certif. parties costs	1 15		
	Total clerk's costs at Austin			102 42
	Marshals Young's costs:			
	Mileage & service, 3 writs	31 92		
	Marshal McCulloch's costs, east dist:			
	For service & mil. 2 writs	28 00		
	Serv. & mil. 1 writ, 1.00, Austin Co	8 00		
		36 00		
	Draughtman & witness fee taxed			67 92
	in court order	31 50		31 50
	Master allowed by decree			250 00
	Solicitor's taxed fee, Alexander			20 00
	This third execution			1 65
	Taxed			$582 89

MATTHEW HOPKINS, *Clerk.*

Endorsements on 3d execution.

In chancery. No. 10. United States circuit court, western district of Texas. Volney E. Howard, et al., heirs at law of Bainbridge D. Howard, deceased, vs. Archibald Hodge, et al., that is to say, Samuel A. Maverick and John H. Herndon. Third execution for costs, decree, &c. Costs, $582.89. Issued third day of June, 1867. Matthew Hopkins, clerk.

Received in office 25 day of September, A. D. 1867. A. P. Blocker, U. S. marshal, by H. Wier. This execution is to be controlled by
102 Russell Howard, esq. Alexander, late sol'r for compl'ts.

Rec'd of S. A. Maverick, San. Antonio, July 29, 1867, the sum of two hundred and ninety-one and $\frac{45}{100}$ dollars, in full of one-half of the within execution by agreement; this is his share, & the remainder is to be collected from J. H. Herndon, without recourse upon said Maverick.

RUSSELL HOWARD,
Ag't for Compl'ts.

This execution rec'd in office September 25, 1867, and returned this Dec'r 20, 1867. Levy made, and having collected two hundred and sixty $\frac{11}{100}$ dollars without sale, which, being only a part of the costs, this execution is returned not satisfied.

A. P. BLOCKER, *U. S. Marshal.*
By HENRY WEIR, *Deputy.*

Mar. orig'l cost on ex	75
Com's on am't coll'd	3 97
Levy and advertising	3 00
Mar. mil. 8	4 80
Ret'g ex'n	75
	$13 27

103 And afterwards, to wit, on the 12th day of June, A. D. 1869, complainants, by their solicitors, filed a petition for rule nisi, which, with the exhibits thereto attached, are in words to wit:

Petition of complainants for rule nisi, against Maverick, Herndon, & others, & exhibits.—Filed June 12, 1869.

In the circuit court of the United States for the western district of Texas, at Austin.

B. D. HOWARD'S HEIRS, COMPLAINANTS, *vs.* ARCHIBALD HODGE ET AL., DEFENDANTS. } In chancery. No. 10.

To the honorable the circuit judges of the United States for the western district of Texas, at Austin, sitting in equity:

The petition of Russell Howard, one of the complainants in the above-entitled and numbered suit, who appears in his own right, and as the representative of the interest of his co-complainants, who, with himself, are the co-heirs of Bainbridge D. Howard, deceased, humbly complaining of Samuel A. Maverick and Branch T. Masterson, assignee of John H. Herndon, a bankrupt, said Maverick and Herndon being defendants in said suit, and said Masterson assignee as aforesaid, now being at Galveston, in the State of Texas, respectfully showeth:

That the foregoing allegations are true, and that the complainants in said suit did, on the twentieth day of June, 1866, on a final hearing, obtain a final decree therein against said named defendants Maverick and Herndon, to which final decree, together with the subsequent
104 orders made, to give precision and effect thereto, ref'rence is hereby made. Petitioner further states that after execution had been issued on said final decree for costs, and not before, said costs were issued by said defendants, but he distinctly states, that said defendants Maverick and Herndon, though duly notified that they ought so to do, have wholly failed to do the specific acts which they were directed to do in and by said decree, &c., and that although duly notified by the terms of said decree & as well as otherwise, they will continue to fail so to do in contempt of the authority of this honorable court. Petitioner further states that divers others, persons who have acquired title or claim under or through said Maverick and Herndon, pending

and with constructive notice of said suit or since and with constructive notice of said decree, have refused and failed and continue to refuse and fail to do the specific acts they are required to do by said decree by which they are equally bound to the extent of their respective claims with said named defendants, whereby they also are in contempt of this honorable court. Petitioner states that the following named are the persons referred to, viz: Herman Hülmer, Mathias Becker, John Loesberg, Martin Schmidt, Joseph Sharp, Louis Huth, Joseph Frey,
John Lehn, A. J. Kustiegska, Louis Graff, Jacob Dreiscourt,
105 Joseph Meyer, Jacob Scherer, Christian Santleben, the heirs of Leonard Hanos, Mathia Youngsman, Jacob & Magdalena Bippert, citizens of Bexar County; and Gerhardt Imken, Joseph Bedar, William Winnan, citizens of Medina County; and that they are others so doing, whose names to your petitioner are unknown, but which, when discovered, he craves leave to insert herein by amendment, to the end that they may be proceeded against as with the persons herein named. Petitioner further states that he has had said decree duly recorded in the counties where the land lies. Petitioner further states that, since the payment of the costs aforesaid, said Herndon has become a bankrupt; that the proceedings in his bankruptcy are pending in the district court of the United States for the eastern district of Texas, at Galveston; that Branch T. Masterson is his official assignee, and that said Masterson, in utter disregard of said decree, and after due notice, which is appended hereto and referred to as a part hereof, has advertised for sale, as a part of the estate of said Herndon, and continues to advertise for sale, divers tracts of land embraced in said decree, as may be seen on reference to said decree and to the printed advertisement of said assignee, a copy of which is hereto appended, and is referred to as a part hereof, and has thereby committed, and still
106 continues to commit, a contempt of this honorable court. Petitioner, in view of the premises, inasmuch as more than a reasonable time has elapsed for the performance of the specific acts directed to be done by said decree, refers to his affidavit filed herewith as a part hereof, and prays the court to enter an order herein for the enforcement of said decree, decreeing that attachment do issue against said Maverick and said Masterson, as assignee, and all persons holding or claiming under said Maverick & said Herndon, who acquired their claims since the inception of said suit, returnable to some day of this June term—such attachment to be endorsed as follows: The within-named parties to be attached, and, when arrested, can only be released from custody on payment of the costs of attachment, and on executing, in duplicate, a release and power of att'y to petitioner, authorizing him or such person or persons as he may substitute, to do the specific act ordered to be done by said decree, the actual costs, the releases, and power of attorneys, of the cancellation of patents, &c., to be paid by said S. A. Maverick and Masterson as assignee', and by those holding as aforesaid under said Maverick and Herndon, together with the costs of this proceeding, to enforce said decree as taxed by the clerk.

RUSSELL & HOWARD.

107 *Affidavit of Russell Howard, filed with preceding motion, & part of the same.*

I, Russell Howard, hereinafter styled affiant, being first duly sworn, do make oath and say that affiant is one of the complainants in chancery suit No. 10, entitled Bainbridge D. Howard's heirs vs. Hodge and

others, in the circuit court of the United States for the western district of Texas, and has, by means of various instruments, the control of the title and interests in the tract of land described in the final decree in said suit of each of his co-heirs, besides being their legal counsel touching the same. Affiant further states that the defendant Sam'l A. Maverick and John H. Herndon, as well as the persons named as holding under them, pendente lite, in the petition for the enforcement of said decree, to which this affidavit is attached, although they have had due notice of said decree, and the reasonable time indicated by the terms of said decree has long since elapsed, and have wholly failed to comply with the same, and have thereby committed, and continue to commit, a persistent contempt of this honorable court. Affiant further states that he has caused actual notice, as appears from a copy of said notice with the affidavit of service endorsed, of said decree so to be served upon Branch T. Masterson, assignee of said Herndon, and that said
108 assignee has failed, and still fails, to comply therewith, and has thereby committed, and persists in committing, a contempt of this honorable court. Affiant further states that said assignee still persists in advertising certain tracts of land adjudicated in favor of complainant in said decree, as the property of the estate of said Herndon, as a bankrupt, as appears by one of the printed advertisements hereto attached as a part hereof, and that he fears that, if said assignee be not restrained by means of the order now sought, he will commit a further contempt of this honorable court, and will seriously embarrass and cloud the title represented by affiant. Affiant further states that the allegations in the petition to which this affidavit is attached, in so far as made from his own knowledge, are true, and in so far as they are made from information derived from others, he believes them to be true. And further affiant sayth not.

RUSSELL & HOWARD.

Sworn to & subscribed before me this 9th day of June, A. D. 1869.
T. H. DUVAL, *U. S. Judge.*

109 [From Flake's Daily Bulletin of June 4th, 1869.]

Assignee's sale.

200,000 Acres of Valuable Land!!

In obedience to an order issued by the Hon. Jesse Stancel, register in bankruptcy for the district court of the United States for the eastern district of Texas, in the matter of John H. Herndon, bankrupt, No. 383, I will sell at public auction, in front of the door of the United States court-rooms, in the city of Galveston, to the highest bidder, for cash, in U. S. currency, commencing on the 5th day of July, 1869, and continuing till the property is disposed of, the following-described property, viz:

1,226	acres	of	land	in	Bosque	Co.,	granted	to James Hughes.
640	"	"	"	"	"	"	"	" Hugh Miller.
320	"	"	"	"	"	"	"	" do. do.
773	"	"	"	"	"	"	"	" L. M. Armstrong.
330	"	"	"	"	Erath	"	"	" J. A. Lancaster.
525	"	"	"	"	Coryell	"	"	" W. Thompson.
531	"	"	"	"	do.	"	"	" James Craft.
Undivided half of 1,280					in Falls	"	"	" J. H. Walker.

853 ac. of land in do. " " " James G. Gray.
1,476 " " " " Guadelupe " " " J. M. Thompson.
1,050 " " " " do. " " " C. Rector.
644⅓ " " " " do. " " " Guadelupe Tores.
960 ac. " " " Bandera " " " A. Kelly.
738 " " " " do. " " " M. Gertrude de los Santos.
106 " " " " do. " " " J. L. Trueheart.
216 " " " " do. " " " W. Winans.
106 " " " " do. " " " W. Winans.

110 1,000 acres of land in Bexar County, granted to A. Staffold.
738 " " " " Medina do. " " W. G. Still.
123 ac. out of the one-third league granted to W. Kiggins in Medina County.
800 ac. in Medina County, granted to A. L. Keykendall.
3,645 " " " " " " Ja's Cammell, on the McMullin grant.
2,291 " " " " granted to J. Foster.
300 ac. in Bexar Co., granted to John Sharp, on the McMullin grant.
700 " " do. do. " " Jane G. Calder, on the McMullin grant.
4,228 " " do. do. " " Jesse Thompson, on the McMullin grant.
8,722 " " do. do. " " A. T. Neal.
976 " " do. do. " " Jno. Barrett.

The above-described tracts of land will be sold subject to all encumberances that may exist thereon.

I will also sell two hundred and forty-five (245) other tracts of land, containing from 106 to 4,605 acres each, making it in the aggregate more than one hundred and seventy-five thousand acres. The encumbered portion of this property will be sold to satisfy the liens, and unincumbered tracts will be sold for the benefit of the creditors.

The land is located in the counties of Fort Bend, Bosque, Hood, Guadelupe, Medina, La Salle, Lampassas, Brown, Callahan, Uvalde, Lavaca, Bandara, Harris, Comal, Blanco, Kerr, Gillespie, Grimes, Madison, Wood, Jack, Commanche, Caldwell, Calhoun, Coryell, Limestone, San Patricio, Karnes, Red River, Wilson, Attascoosa, Goliad, Coleman, Taylor, Jones, Bexar, Runnels, Falls, Fria, Kimball, Shakelford,
111 Mason, McCulloch, Concho, San Saba, Milan, and Harrison.

Also, the following lots in the town of Richmond, Fort Bend County, which will be sold to satisfy all liens existing thereon, viz:

Lots No'. 1, 2, 3, 4, 5, 6, 7, and 12, in block No. 53; lots No. 1 to 14, in block No. 84.

Lots from No. 1 to 14, inclusive, in block No. 103.
" do. do. 1 " 14, do. " " " 104.
Fractional lots No'. 3 and 4 " " " 106.
Lots No'. 8, 9, 10, 11 " " " 113.
" " 6 and 7 " " " 114.
" " 6 and 7 and fractional lots No'. 1, 2, 3, in block 117.
" " 5, 6, 7, 12, 13, and 14, and parts No'. 8, 9, 10, and improvements, in block No. 119; lots No. 3, 4, and 12, in block No. 122; lots from No. 4 to 14, inclusive, in block No. 125; lots No. 12, in block No. 133; lots No'. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14 in block No. 126; lots No'. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14, in block No. 13; lots No'. 1, 2, 4, 5, 6, and 7, in block No. 136; lots No'. 6, 7, and 14, in block No. 140; lots No'. 1 and 2, in block No. 146; lots No'. 1 and 8, in

block No. 106; lot No. 5, in block No. 122; lots No. 3 and 7, in block No. 128; lot No. 2, in block No. 129; lots No. 1 and 12, in block No. 136; lot No. 4, in block No. 139.

Also, all notes, accounts, and evidences of debt belonging to said bankrupt estate. A list of said notes, &c., and a schedule of the land can be seen at any time before the day of sale at the law office of Harris & Masterson, Galveston, Texas. The costs of revenue stamps and executing the deeds will be at the expense of the purchaser.

BRANCH T. MASTERSON,
Assignee.

F. R. LUBBOCK, *Auctioneer.*

112 *Notice to assignee.*

In the circuit court of the United States for the western district of Texas, at Austin.

BETWEEN HEIRS OF BAINBRIDGE D. HOWARD, dec'd, complainant,
and
ARCHIBALD HODGE ET OTHERS, DEFENDANTS.

To Branch T. Masterson, assignee of the estate of John H. Herndon, bankrupt, and to all persons interested in said estate, which is now pending in bankruptcy in the district court of the United States for the eastern district of Texas, at Galveston:

GENTLEMEN: You will please take notice that, by a final decree in the above entitled and numbered suit, said John H. Herndon and the other defendants thereto were directed to cause such patents and locations as they had or claimed that were located within the limits of the large tract known as the San Lucas or pasture-lands of San José grant, and marked on the county maps of Bexar and Medina co'. as the John McMullin tract, to be cancelled and removed, so as not to cloud the title of the heirs of Bainbridge D. Howard, deceased, to said grant, which was adjudged to be a good title; and that since the rendition of said decree said Herndon, without first complying therewith, has gone into bankruptcy, said decree being unreversed, unsatisfied, and in full force, as appears from the records of the court first above mentioned, which are hereby referred to, an original copy of said decree being on file in the general land office, and said decree being of record in Bexar
113 and Medina counties, in the State of Texas, of which you will also take notice.

Now, therefore, you and each of you are notified not to claim, advertise, sell, or purchase any of the several tracts of land named and described in said decree; and that you, and each of you, are hereby called upon to comply, as soon as may be practicable, with the terms of said decreee, so that the land certificates improperly located in said grant may be removed therefrom, and sold as the property of said estate.

You, and each of you, are further notified that *by* terms of said decree, so far as the same relate to said Herndon, are not promptly complied with, and the patents and locations therein described, and which were owned or claimed by him at the time service was had upon him in said suit, or as were in any manner acquired by him since, are not cancelled and removed, as is therein ordered, application founded on this notice will be made during the next term thereof, or as soon

thereafter as may be practicable to the honorable the circuit court above mentioned, for a rule against the assignee aforesaid, to show cause, if any he can, why he shall not be attached for contempt for failing to comply with said decree and with this notice, and for such orders as the nature of the case may require, in accordance with the practice of courts of equity.

HOWARD AND R. A. ALEXANDER,
For Complainants.

114 UNITED STATES OF AMERICA,
Eastern District of Texas:

Appeared before the undersigned United States commissioner, Simeon Massasia, who makes oath that he delivered a copy of the within notice to Branch T. Masterson, esq., on the 1st day of June, 1869, at his office in the city of Galveston; that said Masterson read the same in his presence, & compared it with the within, but declined to enter herein a written acknowledgement of service or notice of the contents thereof.

SIMEON MASSASIA.

Subscribed & sworn to before me this 39th day of June, 1869.

OBER I. LABATT,
United States Commissioner in & for the East. Dist. of Texas.

And afterwards, to wit, on the same day June 12, 1869, the following entry appears upon the minutes of the court, to wit,

115 *Order for rule nisi against Maverick & Herndon.—Entered June* 12, 1869.

In the circuit court of the United States for the western district of Texas at Austin, sitting in equity, on the 12th day of June, 1869.

In the matter of the petition of Russell Howard, one of the complainants in the suit in chancery, numbered ten (10) in this court, wherein the heirs of Bainbridge D. Howard, deceased, were complainants, and Archibald Hodge and others, including Samuel Maverick and John H. Herndon, said Herndon being now a bankrupt and Branch T. Masterson being the assignee of his estate, defendants.

This petitioner, for the enforcement of the final decree and subsequent orders in favor of complainants in said suit, came on to be heard, and was argued at chambers, by petitioner; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows: That a rule nisi be issued forthwith against said Maverick and the other parties named in said petition, except said assignee, returnable on the Saturday preceding the rule-day in August next, commanding them and each of them to obey in all things said final decree, &c., and to pay the costs of this proceeding, to be taxed by the clerk on said rule nisi, and by the marshall also, so far as his costs are concerned, on or before the return-day specified, or else show satisfactory cause to the con-
116 trary; and that, on the failure of them or any of them so to do, that they, in affidavit, filed at any time after the return-day of said rule nisi, be attached for a contempt of this court. No order is made as to said assignee herein, because a special order in bankruptcy to the same end has been this day made.

T. H. DUVAL,
U. S. Judge.

Ordered that the court be adjourned till Monday morning next, at 9 o'clock.

117 *Rule nisi to Maverick & others.—Issued June* 16, 1869.

And afterwards, on the 16th day of June, A. D. 1869, rule nisi was issued in pursuance of the order of the 12th inst., in words, to wit:

UNITED STATES OF AMERICA,
Western District of Texas:

The President of the United States of America to the marshal of said district, greeting:

Whereas, in the circuit court of the United States for said district, in case No. 10 on the chancery docket of said court, styled "Bainbridge D. Howard's Heirs vs. Archibald Hodge et als," upon the petition of Russell Howard, one of said complainants, on the 12th day of June, A. D. 1869, an order was made by said court for a rule nisi against Samuel A. Maverick, John H. Herndon, Herman Hübner, Matthias Becker, John Loesberg, Martin Schmidt, Joseph Sharp, Louis Huth, Joseph Frey, John Lehr, A. J. Krieticgska, Louis Graff, Jacob Droitcourt, Joseph Meyer, Jacob Scherer, Christian Santleben, heirs of Leonard Hans, Matthias Youngsman, Jacob Bippert and Magdalena Bippert, Gerhardt Junken, Joseph Bader, & William Winan, a certified copy of which order for each of said defendants, accompanies this writ:

118 You are therefore hereby commanded to deliver a certified copy of said order to each of the above-named parties, and on or before the Saturday preceding the first Monday in August next, make return into the clerk's office of our said court of this writ, certifying how you have executed the same.

Witness the Honorable Solomon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at the city of Austin, this 16th day of June, A. D. 1869.

[SEAL.] M. HOPKINS, *Clerk.*

Costs of this proceeding to be paid by the defendants, if they comply with the rule.

Clerk's fees: Filing, certifying, & entering petition, 40; entering order for rule nisi, 30; issuing writ, 1.65; 22 copies of order, 24.20—25.85; entering, filing and certifying writ, 40; entering final order on rule, 30—$27. 25.

Marshal's fees: Serving 18 copies of rule, *a* 2.00, $36.00; mileage, 235 miles, a 6c., 14. 10—$50.10.

Received the above writ on the 17th day of June, A. D.
119 1869, and executed by delivering in person a true copy of the writ, and a certified copy of the rule nisi, to each of the defendants hereinafter named: Samuel A. Maverick, on the 17th day of June, A. D. 1869; Christian Santleben, A. J. Krieticgska, Joseph Frey, Jacob & Magdalena Bippert, Jacob Scherer, Louis Graff, Herman Hübner, Joseph Meyer, Jacob Droitcourt, on the 24th day of June, A. D. 1869; Mathia Becker, John Loesberg, Joseph Sharp, & Gerhard Inken, on the 26th day of June, A. D. 1869; Joseph Bader and Mathias Youngsman on the 28th day of June, A. D. 1869; Martin Schmidt, heirs of Leonard Hans & William Winan, not served, because not found; John Lehr & Louis Huth, served on the 1st day of July, A. D. 1869.

A. P. BLOCKER,
U. S. Marshal, W. D. Texas.
FE. LIEDKE,
Special Deputy U. S. M., W. D. Tex.

Return. Filed August 3d, 1869.

M. HOPKINS, *Clerk.*

120 And afterwards, to wit, on the 2d day of August, A. D. 1869, complainants filed the following motion, in words, to wit:

Motion of complainants for attachment & rule nisi.

Filed August 2, 1869.

M. HOPKINS, *Clerk.*

BAINBRIDGE D. HOWARD'S HEIRS, COMPL'TS, *and* ARCHIBALD HODGE AND OTHERS, DEF'TS. } In chancery. No. 10.

In the circuit court of the United States for the western district of Texas, at Austin.

Russell Howard, one of the complainants in the above-entitled and numbered suit, files his affidavit herewith as a part hereof, in pursuance with the rule nisi, heretofore issued by the court, and moves that an attachment be issued accordingly, returnable as the court may direct, against the parties to said rule nisi, who have been served with said rule nisi, and yet have not obeyed the same, and that a rule nisi be granted against the new parties named in said affidavit, returnable as the court may order.

HOWARD AND ALEXANDER,
For Complainants.

Filed August 2, '69.

M. HOPKINS, *Clerk.*

121 And with the foregoing motion, and in support of the same, the complainants filed the affidavit of Russell Howard, which affidavit is in words, to wit:

Affidavit for attachmeut in pursuance of rule nisi.

Filed August 2, '69.

M. HOPKINS, *Clerk.*

In the circuit court of the United States for the western district of Texas, at Austin.

BETWEEN BAINBRIDGE D. HOWARD'S complainants, *and* ARCHIBALD HODGE ET ALS., DEFENDANTS. } In chancery. No. 10.

Russell Howard, one of the complainants in the above-entitled and numbered suit, who is hereinafter styled affiant, being first duly sworn, makes oath and says that Samuel A. Maverick, one of the defendants to said suit, who is named in the first decree and subsequent orders made therein, and in the rule nisi issued thereupon, has been duly served with said rule nisi as appears from the return of the marshal made thereeon, to which reference is made in support of all the statements of service made in this affidavit.

Affiant further states, that said Maverick, although duly served as aforesaid, and in ample time before the return-day thereof, with said rule nisi, has wholly failed and refused, and still continues to fail and

refuse to comply with said final decree, &c., and with said rule nisi' whereby he has committed, and still persists in committing a contempt of this honorable court.

Affiant further states that he is informed and verily believes,
122 that in A. D. 1860 or 1861, and prior to a final decree, having been taken against him in the district court of the United States for the western district of Texas, said Maverick voluntarily abandoned making any further defence in said suit, and withdrew his solicitor and counsel, E. M. Pease, esq., now provisional governor of Texas, from the defence thereof, alleging as his reason for so doing, that he was satisfied that the title of the complainants was superior to his, and that complainants ought, in equity, to have a decree against him and the other defendants to said suit.

Affiant further states, that he is informed and verily believes that said Maverick, since the final decree, etc., were made by the circuit court of the United States for the western district of Texas, at Austin, has repeatedly & publicly declared, that he did not intend to appeal therefrom, and that he was applied for by his co-defendant Herndon to join with him in an attempt at an appeal which he made but did not carry out, having failed to pay for and file a transcript in time, and having gone into bankruptcy, and that he thereupon refused so to do; and affiant refers to his former affidavit in this suit, and to the papers on file therein in support of this affidavit.

Affiant further states, that he is informed, and verily believes,
123 that, after the inception of the rebellion, in 1861 and 1862, said Maverick was a member of the legislature of Texas, and that, acting in that capacity, and with the design of defeating complainants, after he had abandoned the defence of said suit and withdrawn his counsel as aforesaid, did procure the passage by said legislature of an act known as chapter twenty-eight, approved on the third day of January, A. D. 1862, to be found on pages twenty-five, twenty-six, and twenty-seven of the general laws (so-called) of the ninth legislature, and that he then had no other hope of being able to defeat complainants, save by means of said act, to which for the provisions thereof reference is hereby made as to a part of this affidavit.

Affiant further states that he is informed and verily believes that said Maverick, while endeavoring to procure the passage of said act, mentioned the fact that he was promoting it and that he was certain that it would become a law, to the counsel for complainants in said suit, and inquired of said counsel what, in that event, he meant to do. Whereupon said counsel replied that he expected in the course of a few months to have a final decree entered against him in the district court of the United States for the western district of Texas; to which said
124 Maverick rejoined by crying, "Good God, the South never can be subjugated." Whereupon the counsel for complainants said that he fully concurred in that view, and would even add that if the whole United States Army were surrounding Austin, the majority of the people would not feel subjugated, but, on the contrary would feel relieved; which shows that said Maverick had no idea of attempting to make any other defence to said suit, than such as he might be enabled to make in a State court by means of said act.

Affiant further states that he is informed and verily believes that defendant Herndon as well as defendant Maverick, had such an entire confidence that the secession of Texas, in which both of them were active participants, would operate to defeat said suit, and, indeed, all suits pending in the United States courts in Texas, that they deemed any

defence in said suit in A. D. 1861, as superfluous—both said Herndon and said Maverick having been in that year engaged in preparing to defend Texas against the United States Government.

Affiant further states, that one Joseph Courand, of Castroville, Texas, who is now in Austin, and is acting as he states "as agent in fact for the parties in said motion named, except for John Lehr has with notice, actual as well as constructive, of said final decree, &c., and with constructive notice that
125 in pursuance thereof the patents on the John McMullen tract, embracing the town of Castroville, had been cancelled, has, within the last four months, in contempt of this honorable court, entered upon and taken possession, which he still holds, of a certain part of the land embraced in said final decree, &c., which was then in the actual possession of complainants, through Louis Hous, said part being commonly known and described as lot six, (6,) in block four, (4,) in range six, (6,) in the town of Castroville. Said Courand deraigning the title by virtue of which he wrongfully entered upon said lot through the patent which has been cancelled as aforesaid, and through no other grant or pretended grant from the sovereignty of the soil. Affiant further states that the paper-writing filed in this suit on this day, as the affidavit of said Joseph Conrad, is untrue in the following particulars: That said Courand is not the "agent in fact of the parties, except for John Leahr," as he has in said paper-writing stated; and especially that he is not the agent of Joseph Frey, Joseph Bader, and Joseph Krteczka, as will more fully appear from their answer to said rule nisi on file herewith; which answers show that they have fully complied with said final decree, &c., and that they have paid all the
126 costs that accrued against them. Affiant further states that he is informed, and verily believes that Jacob & Magdalena Bippert, Christian Santleben, Jacob Scherer, Louis Graff, and Herndon Hühner, have settled with complainants, so far as their title is concerned, through Charles Le Monted, their grantor, and have obeyed said final decree, &c., and said rule nisi, except that they have not paid; but, on the contrary, refuse to pay the costs accruing against them under said rule nisi; and affiant verily believes that said Conraned is not the agent of said parties, unless he is such solely in regard to the costs that have accrued under said rule nisi. Affiant further states that he was in Castroville when the rise in the Medium River mentioned by said Conrad occurred, and that there was no time during the rise in said river when said river could not be crossed, and was not in fact crossed, by means of skiffs and boats. Affiant is informed, and verily believes, that the marshal's return on said rule nisi shows that the service was had on both sides of said river during said rise. Affiant further states that he is informed, and verily believes, that the letter enclosing the precept for the service of said rule nisi, with the service endorsed
127 thereon, was mailed on the third day of July last, and was received at Austin on the nineteenth day of said month, said letter having been registered. Affiant further states that Mathias Becker, Jacob Droitcourt, Joseph Sharp, and John Loesberg, with Martin Schmidt, who is now dead, were (except said Schmidt) duly served with said rule nisi, and yet have wholly failed and refused to comply therewith. Affiant states that it is true that said parties last named did, on the fifteenth day of September, A. D. 1850, obtain from said Herndon, and from his att'y at law, J. A. Paschall, a title-bond, a certified copy of which is herewith filed and is referred to as a part of this affidavit, and that said parties did not obtain title in accordance with said bond until after

the inception of this suit, to wit, until on or about the twenty-first day of December, A. D. 1851. Affiant further states that said Jacob Droitcourt claims and holds other portions of land conflicting with said McMullen tract, the title to which he obtained from said Herndon during the pendency of this suit. Affiant further states that he is informed and verily believes that none of said parties had actual possession under said Herndon's title prior to the commencement of this suit.

128 Affiant further states that the rule nisi was made to include Jacob Lehr through mistake, affiant having been incorrectly informed as to what land he claimed. Affiant further states that the heirs-at-law of Leonard Hans, deceased, although they have not been served, have voluntarily appeared, and have fully obeyed said final decree, &c. Affiant further states that Louis Huth is in proeess of settlement with complainants; wherefore affiant asks that action as to him be for the present suspended. Affiant further states that the following persons occupy the same position with those named in affiant's former affidavit when the same was made and in the rule nisi issued thereon, and would have been included in said affidavit and said rule had the fact that they were holding portions of said tract to which they obtained possession pending said suit, adversely to complainants, been known to affiant when he applied for said rule, that is to say, John Marian, J. Koenig, Christofer Haller, Arcade Steinly, Carl Geiser, Nicholas Hoffman, Joseph Bendele, Joseph Keller, and said Joseph Courand. And further affiant states that he is informed, and verily believes, that Branch T. Masterson, as assignee of said Herndon in bankruptcy, has not obeyed said final decree, &c. And further affiant says not.

129 The words "said Maverick," interlined on page second hereof; the words "said Maverick," interlined on page second hereof; the words "with the service endorsed thereon," interlined on page five hereof before siguing.

RUSSELL HOWARD.

WESTERN DISTRICT OF TEXAS, *City of Austin:*

Sworn to and subscribed before me this 2nd of August, 1869.

T. D. MOSELY,
Master in Chancery.

130 STATE OF TEXAS, *County of Bexar:*

Know all men by these presents that we, J. H. Herndon, J. A. Paschall, are held and firmly bound unto Joseph Schop, Martin Schmidt, John Loesberg, Matias Becker, Jacob Droitcourt, in the sum of twenty-five hundred dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents.

The condition of the above bond is such that, whereas the said Herndon has sold to the said Sharp, Schmidt, Lisberg, Becker, & Droitcourt, one-third of a league of land situated in Medina County, on the south side of the Medina River, and known and described as survey No. 28, and patented to George W. Pleasants for the sum of six hundred and fifty dollars, to the said Herndon in hand paid, the receipt of which is hereby acknowledged, and the further sum of six hundred dollars for which the said purchasers have executed their note of even date with this bond in favor of the said Herndon, payable on or before the first day of January, 1852: Now, if the said Herndon shall well and truly make or cause to be made to the said Sharp, Schmidt, Lisberg,

131 Becker, and Droitcourt, a good and sufficient deed to the above-described land whenever demanded after the payment of the above-described note, then the above bond to be null and void; otherwise to be and remain in full force and virtue.

Witness our hands & scrolls for seals the 15th day of September, 1850.

J. H. HERNDON. [SEAL.]
J. A. PASCHALL. [SEAL.]

Witness:
ALBERT HUTH.
CHARLES DE MONTEL.

STATE OF TEXAS, *County of Bexar:*

Before me, W. W. McLeod, chief justice & ex officio not. pub. in and for the county and State aforesaid, this day came Charles de Montel, to me well known, who, being by me duly sworn, deposes and said that he saw J. H. Herndon & J. A. Paschal sign the annexed bond for the purposes and considerations therein expressed, and that he signed the same as a witness with Albert Huth at the request of said Herndon & Paschall.

In testimony whereof I hereunto sign my name and affix the impress of my official seal, at my office, in the city of San Antonio, this 18th day of September, A. D. 1850.

[SEAL.]

M. D. McLEOD,
Chief Justice & ex-officio Not. Pub. B. C.

STATE OF TEXAS, *County of Medina:*

I, Louis Huth, clerk of the county court of said county, do
132 hereby certify that the foregoing instrument of writing was filed for record in my office on the 20th day of September, A. D. 1850, at 9 o'clock a. m., and duly recorded in the records of said county in book A No. 1, page' 222 & 223. Witness my hand and seal of said court this the day and year above written.

LOUIS HUTH, *C. C. C. M. C.*

THE STATE OF TEXAS, *County of Medina:*

I, Nicholas Haby, county clerk of said county, do hereby certify that the foregoing instrument of writing is a true copy of the original as found recorded in the records of said county in book A No. 1, pages No. 222 & 223.

Witness my official seal & signature at office in Castroville this 29th July, A. D. 1869.

[SEAL.]

N. HABY, *Co. Cl'k M. Co.*
Per J. CHUSTILBES, *Deputy.*

133

GENERAL LAND OFFICE,
Austin, Texas, August 2, '69.

RUSSELL HOWARD, Esq.,
San Antonio.

SIR: Mr. Maverick has returned no patents for cancellation which conflict with the McMullen grant.

Yours, very respectfully,

JOSEPH SPENCER.

134 And on the same day, to wit, August 2d, 1869, Samuel A. Maverick filed the following affidavit in words, to wit:

Affidavit of S. A. Maverick.

Filed August 2d, 1869.

M. HOPKINS, *Clerk.*

To the Honorable Thomas H. Duval, judge of the circuit court of the United States for the western district of Texas:

In the matter of the rule nisi, granted on the 12th day of June, 1869, on the petition of Russell Howard, esquire, one of the complainants in suit in chancery numbered ten (10) in your hon. court, wherein Bainbridge D. Howard, deceased, heirs, are complainants, and Archibald Hodge and others, including your respondent, are defendants.

Said respondent, Sam'l A. Maverick, responding, says that, desiring to obey faithfully said rule and order, and fearful that, in one way, he had given cause of complaint, upon having an interview with two parties to whom he had given bonds for suit-claim deeds for lands on the McMullen grant in said suit, when one of said parties, Joseph Conrad, at your respondent's request, received back all the money paid by him, the other party declining to do so; and your respondents will continue carefully to render all sorts of present practical obedience to the several orders, rules, and decrees of the court in said suit.

135 But your respondent in consideration of his extreme and continued ill health, until within a short period, would claim and pray the indulgence of your honor to allow him reasonable time to inquire of learned counsel if, what the late Hon. J. A. Paschal informed your respondent be now practically true, to wit, that your respondent is entitled in some legal mode to a trial upon its merit of the said suit in chancery, No. 10, by a review or appeal within five years next after the final decree, by default, which was had in said suit; but meanwhile, waving all such considerations, your respondent will strictly and constantly abstain from all acts and words which could be construed into a cloud upon the title of the complainants, or disobedience of the decrees, rules, and orders of the court in said suit; and your respondent respectfully asks all other and further relief which may seem to your honor just and reasonable.

SAMUEL A. MAVERICK.

Personally came the above-named S. A. Maverick, who, being by me duly sworn says that all the facts in the above answer or writing, stated as of his own knowledge, are true; and those given upon

136 the information of others he believes to be true.

S. A. MAVERICK.

Sworn to and subscribed before me this 28th day of July, A. D. 1869.

[L. S.] THOMAS M. PASCHAL,
U. S. Com. W. D. Texas.

Answer & affi't of S. A. Maverick. Filed Aug't 2, '69.
MATTHEW HOPKINS, *Clerk.*

137 And afterwards, to wit, August 2d, 3d, and 6th, A. D. 1869, the following entries appear upon the minutes of the court, to wit:

Entries and orders upon preceding motions of Aug't. 2, 3, & 6th, 1869.

MONDAY MORNING, *August* 2, 1869.

Court was opened pursuant to adjournment of the 30th of June, ult. Hon. Thomas H. Duval, U. S. judge setting as chancellor, the following orders were made:

B. D. HOWARD'S HEIRS *vs.* ARCHIBALD HODGE ET AL. } 10. Ch'c'y.

On motion of Russ'll Howards for compl'ts, the rule nisi herein was set for hearing to morrow morning.

TUESDAY, *August 3d*, 1869.

B. D. HOWARD'S HEIRS *vs.* ARCHIBALD HODGE ET ALS.

On this day come the parties, by their solicitors, the compl'ts by Alexander and Howard, and of the defendants, by Hancock & West, and thereupon the motion of complainants, (Howard,) set for hearing this day, was argued, and the same was held for consideration.

In the circuit court of the United States for the western district of Texas, at Austin.

FRIDAY, *August 6th*, 1869.

BETWEEN BAINBRIDGE D. HOWARD'S HEIRS, compl'ts, *and* ARCHIBALD HODGE AND OTHERS, DEF'TS. } In chancery. No. 10.

In the matter of the rule nisi, issued by order of this court to
138 enforce afinal decree &c., in this suit, and made returnable on the last Saturday of July, A. D. 1869.

It appearing from the return of the marshal thereon, that the persons named therein, and against whom this order is made, have been duly served with said rule nisi, and a motion for an attachment, and also for other rules nisi against other persons, having been filed by Russell Howard, one of the complainants in this suit, accompanied by an affidavit, in pursuance with the order granting said rule nisi, on the second day of August, A. D. 1869, and a motion for further time to make a showing in reference to said rule nisi, accompanied by showings in support thereof, having been filed on the same day by Matthias Becker and others named therein; and, both of said motions having been argued by the counsel respectively appearing of record in support thereof, and of the argument of the counsel thereon, it is ordered, adjudged, and *and* decreed, as follows, namely, that inasmuch as it appears to the court that Samuel A. Maverick, John Loesberg, and Mrs. Schinst, widow of Martin Schindt, dec'd, and Matthias Youngsman have committed and are committing a contempt of this court in not in all things obeying said final decree, & c., that an attachment be

139 issued against them forthwith, returnable on the first Monday in October next, all the costs as to said rule nisi and upon the attachment hereby ordered to be paid by them. It further appearing that the following-named persons have, since service upon them of said rule nisi, obeyed said final decree, &c., but have failed to pay the costs that have accrued on said rule nisi against them, and that they have thereby committed a contempt of this court, it is ordered, adjudged, and decreed, that an attachment be issued against them forthwith, returnable on the last Saturday of September next; that is to say, against Jacob Bippert, Christian Santleben, Louis Graff, Jacob Scherer, and Herman Hühner, from which they can only be discharged on payment of all the costs against them on said rule nisi and upon such attachment. It appearing to the court that John Leehr has been included in said rule nisi, through mistake, it is ordered that the same be dismissed, as to him, at complainant's costs.

It *is* further appearing to the court that Louis Huth is in process of settlement with complainants, it is ordered, on their motion, that further proceedings as to him be suspended until the last Saturday in September next.

140 It further appearing to the court that Joseph Krleogka, Joseph Baden, Joseph Fry, and the heirs of Leonard Hans, deceased, have obeyed said final decree, &c., and have paid the costs that accrued against them in said rule nisi, that said rule nisi be dismissed as to them. It is further ordered that a rule nisi be issued forthwith to this judicial district, and to be made returnable on the last Saturday of September next, against the following persons named in the affidavit of Russell Howard, in support of his motion, to wit: John Marion, Joseph Roaning, Christopher Haller, Alcade Steinley, Carl Geiser, Nicholas Hoffman, Joseph Bendile, Joseph Keller, and Joseph Courand. It is further ordered, &c., that a rule nisi be issued forthwith to the eastern district of Texas, against Branch T. Masterson, as the assignee of John H. Herndon, a bankrupt, returnable on the last Saturday in September next. Each of said rules nisi to command the persons or person named therein, to in all things obey the final decree, &c., aforesaid, or to show sufficient cause, legal or equitable, for not having so done

141 on or before the return-day thereof. The motion of said Russell Howard being sustained upon the record of this suit, and upon the showing made in support thereof in the foregoing particulars, it is further ordered, &c., that the motion of Matthias Becker, Jacob Droiscourt, Joseph Sharp, Gerhard Juker, Joseph Meyer, on the showing made in support thereof be sustained, and that the time in which they and each of them may in all things obey said final decree, &c., or else make a satisfactory, legal or equitable, showing why they have not done so, be extended to them until the last Saturday in September next, they to pay the costs of their motion. It is further ordered, &c., that, inasmuch as the heirs of Leonard Hans, deceased, have obeyed said final decree, &c., and that Hans, the widow of said deceased, who has voluntarily appeared in this proceeding, without having been made a party thereto, be dismissed without costs.

T. H. DUVAL,
U. S. Judge.

And afterwards, to wit, on the 20th day of August, A. D. 1869, writ of attachment issued against S. A. Maverick & others, endorsed: "Issued Aug't 20, 1869. M. Hopkins, clerk." In words, to wit:

142 *Writ of attachment against S. A. Maverick, John Loesburg, Mrs. Schmidt, widow of Martin, and Matthias Youngsman.—Iss'd Aug. 20, 1869.*

Writ of attachment vs. S. A. Maverick, John Loesberg, Mrs. Schmidt, widow of Martin, Matthias Youngsman. Issued Aug't 20, '69.

M. HOPKINS, *Clerk.*

Circuit court of the United States for the western district of Texas, at Austin, sitting in chancery.

UNITED STATES OF AMERICA,
Western District of Texas:

The President of the United States to the marshal of the western district of Texas, and to all whom these presents shall come, greeting:

Whereas, on the 20th day of June, A. D. 1866, in our circuit court of the United States for the western district of Texas, sitting in chancery, at Austin, in said district, a final decree was entered in case No. 10, chancery, entitled Heirs of Bainbridge D. Howard vs. Archibald Hodge et als., against John H. Herndon and Sam'l A. Maverick, for the tract of land in complainant's bill described; and whereas "It was further ordered and decreed that all patents, locations, and surveys obtained or owned by said defendants Maverick and Herndon, which are in conflict with the title of complainants, which is decreed to be a good title, are, and are hereby, adjudicated to be null and void, and that said defendants shall cancel and remove the same."

143 And whereas, afterwards, to wit, on the 12th day of June, A. D. 1869, upon the petition of Russell Howard, one of the complainants in said cause, for the enforcement of the final decree, a rule nisi was ordered to be issued forthwith against said Maverick and the other parties named in said petition, returnable on the Saturday preceeding the rule day in August, commanding them and each of them to obey in all things said final decree, & to pay the costs of this proceeding, to be taxed by the clerk on said rule nisi, and by the marshal also, so far as his costs are concerned, on or before the return-day specified, or else show satisfactory cause to the contrary; and that, on the failure of them or any of them so to do, that they, on affidavit filed at any time after the return-day of said rule nisi, showing their failure, be attached for a contempt of this court. And, it further appearing by the marshal's return on the said rule nisi, issued in pursuance of the foregoing order by the clerk of the court, that all the parties were duly served with said rule, on the motion of Russell Howard, one of the complainants, for attachments, and also for other rules nisi, heard, argued, and order entered, on the 6th day of August, 1869, in said court of chancery,

144 upon affidavit, in accordance with the previous order, it was ordered, adjudged, and decree as follows, namely: That, inasmuch as it appears to the court that Samuel A. Maverick, John Loesberg, and Mrs. Schmidt, widow of Martin Schmi't, dec., and Mathias Youngsman, have committed and are committing a contempt of this court in not in all things obeying said final decree, &c., that an attachment be issued against them forthwith, returnable on the first Monday in October next, all the costs as to said rule nisi and upon the attachment hereby ordered to be paid by them."

In pursuance of the foregoing recited orders, you are hereby commanded to attach the bodies of the said Samuel A. Maverick, John

Loesberg, and Mrs. Schmi't, widow of Martin Schmi't, deceased, and Mathias Youngsman, and them safely keep until their compliance with the orders herein recited be fully made in all things, and the payment of the costs taxed against them, and they hereby purged and discharged of the contempt, or until the further orders of the court be had therein, and in this, and the things which are done by you in pursuance hereof, make due return, together with this writ of attachment, on or before the first Monday of October, A. D. 1869, the return-day hereof.

145 Witness the Honorable Salomon P. Chase, Chief Justice of the Supreme Court of the United States, & the seal of our said circuit court at Austin, this 20th day of August, A. D. 1869, and 94' year of the independence of the United States of America.

[L. S.] MATTHEW HOPKINS, *Clerk.*

The U. S. marshal for the western district of Texas is hereby instructed to release Mr. Maverick from attachment, upon his first making, before a U. S. commissioner, or other competent officer, an affidavit that he has not wilfully and intentionally committed any contempt of the circuit court of the United States for the western district of Texas, and he does not claim adversely to the heirs of Bainbridge D. Howard, deceased, any portion of the tract of land described in the final decree and subsequent orders in the suit in said court of said heirs against Archibald Hodge and others, in chancery, No. 10; and further, that he will, in a reasonable time, in all things obey said decree, &c., and upon his paying at once all the costs taxed upon the rule nisi and upon the attachment issued against him.

Castroville, Medina County, Texas, September 4, 1869.

RUSSELL HOWARD.

STATE OF TEXAS, *County of Bexar:*

146 Before the undersigned authority personally came S. A. Maverick, defendant in the suit in chancery No. 10, B. D. Howard's Heirs against A. Hodge & others, in the hon. circuit court of the U. S. for the western district of Texas, who, being by me duly sworn, on his oath says that, at no time or any manner did he intend contempt or disobedience of the orders and decrees of said court, and that he never attempted to take possession, neither is he in possession, of any of the lands embraced in said orders and decrees; and affiant has paid to the U. S. marshal the costs demande' of him in said suit in ch'c'y, No. 10. But said affiant Maverick reserves to himself all the rights to which he may hereafter be found entitled, to have a rehearing or review of said case in chancery, No 10, or proceedings in the nature of appeal, &c.

SAM'L A. MAVERICK.

Sworn to and subscribed before me this 8th day of September, A. D. 1869.

[L. S.] THOMAS M. PASCHAL,
U. S. Commiss. W. D. Texas.

Costs to be paid by the defendants: 1-22 part of each of orig'l costs, being 4-22d orig'l costs, $96.15=17.48^2 each; ent'g order, 30; add'l costs of order, & attachment, 2.00; each copy 75c—75—2.75; marshal's

147 mil. & service of this writ to be added; each of the named def'ts pay ¼.

Received in office August 27, 1869, and executed in Medina County on

September 4, by attaching the within-named John Loesberg and Mrs. Theresa Schmidt, the widow of Martin Schmidt, deceased, who thereupon having, by affidavit, disavowed any intention to commit contempt, & having in all things obeyed the final decree in the suit in chancery &c., No. 10, in which this attachment is issued, and also having paid all the costs due by them on said attachment, now, by direction of Russell Howard, esq., one of the complainants in said suit, discharged. The within-named Mathias Youngsman was not attached, because, according to general reputation, is dead. Executed on the within-named Sam'l A. Maverick, at San Antonio, on the 9th day of September, A. D. 1869, by attaching his person, and he having declined to cancel, &c., as directed by the decree, & having also declined to cancel, &c., before the return-day of this writ, was brought by me to Austin and is held subject to the further order of the court. The following papers to wit: The instruction of Russell Howard, esq., to myself, dated Sept. 4, 1869, which I have been at all times ready to follow, as they appeared to be not only proper, but liberal, and the affidavit of said Maverick, dated on the 8th day of Sept., 1869, & by him handed to me, are
148 herewith filed and are made and referred to as constituting a part of this return. The costs taxed against the said Maverick were by him paid, upon his being attached, the same then amounting to eighteen & $\frac{56}{100}$ dollars.

A. P. BLOCKER.
U. S. Marshal W. D. Tex.

M. m., 17.40; ex't'g 3 wr'ts, 6.00; custody, 6.00; disch'ge, 1.50; reports, 2.25; comm's., 1.00; int., 1.00—$35.15.

Costs on original rule nisi, costs to be paid by the def'ts Maverick, Loesburg, Mrs. Schmidt, Youngsman, each 1-22 part of orig'l costs, am't'g to $96.15; 4 def'ts 4-22=2-11—$17.48 on rule nisi; ent'g of order 30; copy of order & attach., 2.00; 4 copies of order for service 75c—75—$20.53.

Marshal costs: Executing writ of attachment, $2.00; $8.00 mileage.

149 And, on the same day, Aug't 20, 1869, order & rule nisi issued to Branch T. Masterson, assignee in bankruptcy of Jno. H. Herndon, b'k'pt, in words to wit:

Order & rule nisi to Branch T. Masterson, assignee in bankruptcy of Jno. H. Herndon, bankrupt, iss'd August 20, 1869.

M. HOPKINS, *Clerk.*

Circuit court of the United States, western district of Texas, at Austin, sitting in chancery.

UNITED STATES OF AMERICA,
Western District of Texas:

The President of the United States to the marshall of the eastern district of Texas, and to all to whom these presents shall come, greeting:

Whereas, on the 20th day of June, A. D. 1866, in our circuit court of the United States for the western district of Texas, sitting in chancery, at Austin, in said district, in case No. 10, chancery, entitled Bainbridge D. Howard' Heirs vs. Archibald Hodge et als., a final decree was entered against John H. Herndon and Samuel A. Maverick, for the tract of land in complainant's bill described;

And whereas, it was further ordered and decreed that all patents,

locations, and surveys, obtained or owned by said defendants, Maverick and Herndon, which are in conflict with the title of complainants, which is decreed to be a good title, are, and are hereby adjudicated to be, null and void, and the said defendants shall cancel and move the same.

And whereas, afterwards, to wit, on the 12th day of June, A. D.
150 1869, upon the petition of Russell Howard, one of the complainants in said cause, for the enforcement of the final decree, a rule nisi was ordered to be issued forthwith against said Maverick and the other parties named in said petition, returnable on the Saturday preceeding the rule-day in August, commanding them, and each of them, to obey in all things said final decree, and to pay the costs of this proceeding, to be taxed by the clerk on said rule nisi, and by the marshal also, so far as his costs are concerned, on or before the return-day specified, or else show satisfactory cause to the contrary; and that on the failure of them, or any of them, so to do, that they, on affidavits filed at any time after the return-day of said rule nisi showing their failure, be attached for a contempt of this court.

And it further appearing by the affidavit of the said Russell Howard, complainant, that Branch T. Masterson, as assignee in bankruptcy of said John H. Herndon, has not obeyed said final decree, etc.:

Upon motion of the said Russell Howard, for other rules nisi, heard and argued on the 6th day of August, 1869, it was ordered as follows:

It is further ordered, &c., that a rule nisi be issued forthwith to
151 the eastern district of Texas, against Branch T. Masterson, as the assignee of John H. Herndon, a bankrupt, returnable on the last Saturday in September next, each of said rules nisi to command the person or persons named therein to in all things obey the final decree, &c., aforesaid, or to show *show* sufficient cause, legal or equitable, for not having so done, on or before the return-day thereof, all the costs as to said rules nisi to be paid by them.

You are therefore commanded that you serve the aforesaid Branch T. Masterson, assignee in bankruptcy of the estate of John H. Herndon, bankrupt, if to be found in your district, with the accompanying copy of this order and rule nisi, in order that he may, in accordance with said rule nisi, show cause, &c., if he should desire so to do. Make due return hereof on or before the last Saturday in September next, showing in all things what you have therein done in this behalf.

Witness the Honorable Salomon P. Chase, Chief Justice of the Supreme Court of the United States and the seal of our said circuit court, at Austin, this 30th day of August, A. D. 1869.

[L. S.] MATTHEW HOPKINS, *Clerk.*

152 Received, Aug't 25th, 1869, and I executed the same on the 28th day of August, 1869, by delivering to Branch T. Masterson, in person, in the eastern district of Texas, a true copy of this order and rule nisi, as certified to by the clerk of the court, western district.

[L. S.] W'M E. PARKER, *U. S. M.*,
By GEO. P. DOUGLASS, *Deputy.*

M. m., 14.40; service, 2.00—$16.40.

B. D. HOWARD'S HEIRS
vs.
ARCHIBALD HODGE ET ALS.

Order & rule nisi to Branch T. Masterson, assignee of the estate of John H. Herndon, b'k'pt. Issued Aug't 20th, '69.

M. HOPKINS, *Clerk.*

Return filed Sept'b'r 14, '69.

M. HOPKINS, *Clerk*,

Bill of costs to be paid by resp.

Ent'g order as to rule nisi	30	
Copy of order & rule nisi	1 65	
Copy of same & ent'g	75	
		2 70
Marshal's cost for serving writ		2 00
M. m., 240		14 40
		19 10

153 And afterwards, to wit, on the 4th day of Oct., A. D. 1869, at rules, Branch T. Masterson, assignee in bankruptcy of J. H. Herndon, bankrupt, filed his answer to the rule nisi in words, to wit:

Answer of Branch T. Masterson, assignee in bankruptcy of John H. Herndon, bankrupt, to the rule nisi. Filed Oct. 4, 1869.

M. HOPKINS, *Clerk*.

At Austin, Tex's. In U. S. circuit court western district of Texas. In *in* chancery. No. 10.

B. HOWARD'S HEIRS
vs.
HODGE, HERNDON, ET ALS.

And now, at this day, comes Branch T. Masterson, assignee in bankruptcy of the said John H. Herndon, & for answer to the rule nisi sued out and issued against him by an order of said court, dated Aug. 6th, 1869, which said order was based on an affidavit of one Russell Howard, representing himself to be one of the heirs of the said B. Howard, & one of the parties to said suit, which said affidavit is filed on the 2nd day of Aug., 1869, would most respectfully answer:

That, about the 12th day of June, A. D. 1869, the said above-named Russell Howard filed a petition in the district court of the United States for the eastern district of Texas, sitting in bankruptcy, at Galveston, Texas, which said petition was filed & constituted a part of the proceedings in bankruptcy in case No. 383, being the case of the bankrupt John H. Herndon above-named, against his creditors, & being
154 the same estate of which this respondent is the assignee, which said petition was addressed to your honor in your capacity of district judge, acting by special authority as judge of the said district court for the eastern district of Texas, sitting at Galveston; & in said petition the said Howard set up substantially the same matters as appear in his said affidavit, setting forth in said petition the entry of a final decree in the case of B. Howard's Heirs vs. Hodge et als., against the *bankrupt* of J. H. Herndon, directing the cancellation of certain patents; & also set forth certain acts of this respondent, such as the advertisement for sale of the right of said Herndon in said patents and lands covered by them; & set forth the fact of notice of said decree having been served on this respondent, and prays said district court for said eastern district "to order this respondent to obey said final decree; that he strike

out from his advertisement all lands located upon said grant; that he cause the patents, surveys, and locations on said grant which were owned by said Herndon when said suit was commenced, or in which he had or claimed then or since, to be cancelled, & that he dispose of the certificates *in* which they are based, & not the lands
155 covered by the same, as the property of said estate." And the said Howard further prays that the respondent have until the 1st of July next to comply with this order, &, in case of his failure to do so, an attachment shall issue against him for contempt, &c., &c. On this said petition your honor, acting in your capacity as judge for the eastern district, issued, in Jan., A. D. 1869, your fiat, in which, after granting the writ of injunction prayed for, it is further ordered by your honor that this respondent, as assignee as aforesaid, show cause on the first Monday in July next, in the United States district court, at Galveston, why he should not be ordered by said court to deliver up for cancellation all patents, surveys, and locations made by said Herndon on the lands decreed as aforesaid to the heirs of said Howard, & amend the schedules of the said bankrupt by placing thereon the land certificates, by virtue of which the said patents, surveys, and locations were ob tained, and selling the same, instead of the lands themselves, as assets belonging to the estate of the said bankrupt.

This respondent further says that, in obedience to the fiat of the
156 said judge & of the writ of injunction issued in said case, he ceased to advertise said land for sale, or to do any other act that would be in violation of your honor's orders in the premises. That, in accordance with your honor's orders, & in prompt obedience to the same, he did, at Galveston, Texas, in the district court for the western district of Texas, file, on the first Monday in July, 1869, as commanded, his answer, setting up & showing cause why he should not be required to obey your honor's order, & why he should not cancel the said patents, & obey the said final decree of the 20th of June, 1866, which said answer was duly sworn to, & the same is now on file of said court, the same not being excepted to or stricken from the files of said court; & he says that no further order has been entered in said cause in said district court for said eastern district at Galveston, & that said cause is now pending in said district court last-named of this present term, & has been so pending since the filing of the same. This respondent asks in support of these averments to be allowed to exhibit & refer to the petition, answer, fiats, orders, & affidavits or copies of the same, as often as he may deem necessary herein.

157 This respondent further says that he has never intended, at any time, by any action of his, any disrespect whatever for your honor's court, or for any of its orders or process, but he says that no order of any kind, except the rule nisi of August 6th, 1869, to which this his present answer is now filed, has ever been served on him from the said United States circuit court for the western district of Texas, at Austin; & that all orders in relation to said final decree of June 20th, 1866, issued to him from the United States district for the eastern district of Texas, sitting at Galveston, he has either promptly obeyed, or else he has, as he was by said orders authorized to do at the time and place in said order indicated, showed cause, in respectful terms, why said orders should not be enforced against him, & that said answer, so showing cause, has never been held insufficient by the court ordering the same, & that, in so answering, he has been careful to state fairly & fully all the facts in his knowledge, as he is acting in a fiduciary capacity as the assignee of the said Herndon, & as agent for his said creditors, &

that the said lands, the patents to which the said Howard &
158 others seeks to cancel, are placed upon the schedules of the said bankrupt as parts of his assets, and, as such, are, as he is advised, liable to the payment of his debts in the hands of this respondent.

Respondent further says that he is advised & believes, & therefore, with the utmost respect suggests to the court that the district court for the eastern district of Texas, sitting at Galveston, has, by virtue of the enlarged & extraordinary powers, both in law & equity, granted to said court by the act of the Congress of the United States, entitled "An act to establish a uniform system of bankruptcy, 2nd March, 1867," full power & jurisdiction over the matters in question, and that the same being brought into requisition on the application of complainant, & the same being now pending in said district court, that the said complainant is estopped from asking the interposition of the court, & that, by reason of all the facts, *that* the court has no jurisdiction or power to call upon this respondent, at present, to comply with said rule.

Respondent further says that he is advised that, by reason of the fact that the said first decree was rendered against the said
159 bankrupt Herndon, on the 20th of June, 1866, & that subsequent to that date, to wit, on the 31st day of December, A. D. 1868, the said Herndon was adjudicated a bankrupt in the said United States district court for the eastern district of Texas, at Galveston, & that, on the 30th day of April, 1869, this respondent was appointed assignee of the estate of said bankrupt, & on the 30th day of April, 1869, in pursuance with the bankrupt law the register of said court made a deed to this respondent, conveying to him all the right and interest of every ind of the said bankrupt Herndon; that, by virtue of the operation of the bankrupt law & of the provisions of the same, *that* the said United States circuit court sitting in ch'c'y lost its power & control over said final decree so as to enforce the same in the ordinary mode against this respondent, as said final decree became a claim or demand against the said estate of the bankrupt, &, like all other judgements, decrees, liens, debts, and claims of every kind whatever against the said bankrupt, was under the control and jurisdiction of the said district
160 court for said eastern district sitting at Galveston, and to that court alone & not to this court could application be made for the enforcement of said final decree.

Respondent further represents that he has been put to considerable cost & expenses in reply to this present rule nisi & should the court hold the same to have been wrongfully demanded as against him, then he asks that the clerk of the said court may be directed to inquire into the costs & expenses incurred by this respondent & that the same be taxed against the said complainants & execution issued for the same, & that this respondent be allowed to go hence, without day &c., &c., &c., &c., &c.

BRANCH T. MASTERSON,
Assignee of estate of John H. Herndon, Bankrupt.

HANCOCK & WEST, *Solis.*

Sworn to & subscribed before me this 4th day of October, 1869.
M. HOPKINS, *Clerk.*

Answer of B. T. Masterson, assignee to rule nisi. Filed Oct. 4th, 1869.

M. HOPKINS, *Clerk.*

And afterwards to wit, on the some day, Oct. 4, 1869, came Sam. A. Maverick & filed his answer and affidavit to the rule nisi, endorsed
161 to wit: "Answer and affidavit of Sam. A. Maverick. Filed Oct. 4, 1869, M. Hopkins, clerk," and which is in words, to wit:

Ans. & affidavit of S. A. Maverick to the rule nisi.—Filed Oct. 4, 1869.

In the circuit court of the United States for the western district of the State of Texas, at Austin.

THE HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE, ET ALS. } No. 10. In chancery.

In the above entitled and numbered case the said defendant Samuel A. Maverick, who has been attached on the charge of contempt of this honorable court, on oath states that he has not intentionally or wilfully been, or in any manner acted, in contempt of the authority of this honorable court, its authority or decree, and this respondent here begs leave to refer to, and have considered a part hereof, his statement informally made in response to the rule nisi served on him and returnable to the rule-day of this honorable court of August last past, or the Saturday preceeding said rule-day, and again here now reiterates and states that, being well stricken in years, and sufferings for several months previous to the service of said rule nisi from ill health, so much so as to have been much of the time confined to his bed, he
162 was greatly thereby prostrated, and felt himself incapable, both mentally and physically, of properly attending to important and complicated business, as he, this respondent, regards the duty now devolved on him. Wherefore he humbly asks that, for said reasons, he may be exonorated in the mind of this honorable court from any contempt by reason of his failure and inability as aforesaid to respond to said rule nisi, further than he did as aforesaid. And this respondent further begs leave to represent and show, in response to the attachment under which he has been seized and is now held, issuing out of and under the order of this honorable court, that it is not true, as by said Russell Howard, esq., is stated in the affidavit filed herein on the 2nd day of August, 1869, that he, this respondent, abandoned or forbore making any further defence in said suit, or that he withdrew his counsel, E. M. Pease, esq., from the defence of the same; or that he, this respondent, alleged that the title of complainants was superiour to his, and that the complainants ought, in equity, to have a decree against him, this respondent, or use any words or declarations of like import or meaning; nor is it true, as alleged by said affiant in his
163 said affidavit, that he, this respondent, has repeatedly and publicaly, or, in fact, on any occasion, either public or private, stated that he did not intend to appeal from or resist the decrees and orders had against him in this suit; nor is it true that this respondent was applied to by said John H. Herndon, to join him in an attempt at an appeal of this suit, there being no intimacy, complicity, or joint action between said Herndon and this respondent. And further this respondent denies that it is true as stated by said affiant in his said affidavit, that he, respondent, in any sense, as member of the legislature of the State of Texas, procured the passage of the act referred to by him for any such thought or purpose as that attributed to him by said affiant if, in point of fact, he voted for its passage at all, which he does not now

recollect, but if he did it, it was solely for the purpose, as he then believed, of promoting the public good, and with no purpose or intention on the part of this respondent to defeat affiant's rights, or any one else; nor does he now perceive, after having examined said law for the first time, that it was contrived to defeat said complainants' right, or that a citizen of another State than Texas would be robbed of his rights by the citizens of Texas under its
164 provisions. And the respondent further says that the pretended conversations, as stated by said affiant Howard, between him, respondents' and complainants' solicitor, are partial and prejudicial rehearsals of political conversations, controversies, and arguments had between respondent and said solicitor, having no ref'rence or thought on the part of respondent to this suit, but wholly relating to the secession madness of the day; and the insinuation by said affiant to the contrary, as well as the alleged conspiracy with said Herndon to defend Texas against the United States Government, is a gross slander on respondent, and if not with the design of exciting a feeling of prejudice against respondent in the mind of this honorable court, (which he does not by any means fear,) he, respondent, regards as totally irrelevant as to the present matter before the court, and as such this respondent does not deem it incumbent on him to further respond to that part of the affidavit of said Howard.

And this respondent further states and shows to this honorable court that, in the spring of the year 1860, and previous thereto, there was the most friendly, and, on the part of the respondent, the most cordial
165 attachment between him and said William Alexander, esq., the solicitor for complainants, to whom he made friendly visits. During which time, to wit, in the spring or summer of 1860, he, said solicitor informed respondent that he had been charged with a message to him, from his, respondent's, solicitor, said E. M. Pease, esq., to the effect that he, said Pease, would certainly be back to Austin from the trip taken North in time to try the suit, meaning this suit, at, as respondent thinks, *at* the next term of the court; and at the same time said Alexander, as respondent's pretended friend, persuaded him that it would be for his interest, in order to get rid of all old and former orders and actions in the case, to sign with him a simple agreement to be ready, as affiant thinks, for trial at the next term. Whereupon, trusting to and relying on the professed friendship of said Alexander, and the reiterated assurance that his, respondent's solicitor would certainly be back in time to attend to his interest in said suit, he did sign the agreement of date of the 20th of June, 1860, under the impression and belie*v*e at the time, that it was as said Alexander represented to him: that it was merely an agree-
166 ment for trial at the next term of the court, conformable to and consistent with the friendly relation and understanding between said Alexander and respondent's said solicitor; and believing that no order would be had or action taken to his prejudice in the suit without due notice given to his said solicitor, and opportunity allowed him to set up and make defence to said suit, said Alexander withholding from respondent information of the existence of an agreement between him, said Alexander, and said E. M. Pease, esqr., as this respondent's solicitor, in regard to the management and conduct of the defence of said suit for and on behalf of this respondent, which agreement will more clearly and satisfactorily appear from the affidavit of said Pease, herewith exhibited, of date the 2nd of October, 1869, and asked to be taken and considered as a part hereof; but respondent begs leave here to ask in relation to that part of said last referred to affidavit where said E. M.

Pease, esq'r., says, "I at once notified Mr. Maverick that, as he had made an agreement with the opposing counsel in regard to his case, without giving me notice, I should not hold myself responsible for its management after the date of the agreement, and that I would have nothing further to do with the cause;" that, while he does not mean to
167 doubt or question the truth or sincerity of this part of said affidavit, the truth is that this respondent never received any notice from his said counsel, Pease, that he had withdrawn from his defence in said suit, and if any such notice was written to him, as he supposes from said recited statement must have been the case, the same did not reach him, nor did respondent ever have any conversation on the subject with the said Pease until within the last ten or fifteen days, when respondent heard for the first time the reason assigned by said Pease, why he had not attended to the defence of said suit for him, respondent, which was the same as that set out by said Pease in his said affidavit; and for the first time in said last referred to conversation he learned of the existence of the agreement between his said counsel & said Alexander with reference to the conduct and management of his said defence, this respondent not having been at any time before informed of the existence of said agreement, nor, as before stated, did said Alexander, as respondent submits in fairness and good conscience he was bound to have done, when he induced respondent in manner and form as hereinbefore stated
168 to sign said agreement of the 20th of June, 1860, which respondent says he would not have done but for the artifice so practised on him by said Alexander and his, respondent's, ignorance of the existance of said agreement with said Pease. And respondent further states and shows that, being in said city of Austin about the month of January or February, 1861, he thinks it was, and probably pending the secession convention, and having heard that said Alexander had taken some sort of order or judgement by default, in said suit, against him, he, respondent, met said Alexander on the steps of the capitol in said city, and appealed to his sense of justice and propriety, reminding him that said agreement, meaning that of the 20th of June, 1860, was signed in confidence, and, on his representations and friendly message from Gov. Pease, said respondent maintaining that it should not be taken advantage of to the injury and prejudice of him, respondent, in the absence or want of knowledge of his said counsel, Gov. Pease, this respondent supposing at the time that the action complained of had been
169 taken by said Alexander, before Gov. Pease returned from his trip to the north, but, in point of fact, seems to have occurred subsequent to his return, but without any notice to him, respondent, or his said solicitor of the same, as he in fairness and good conscience was, as hereinbefore stated, entitled to have had from said Alexander, when he, said Alexander, seemed touched by the appeal thus made to him by respondent, and thereupon replied to respondent that "I will do nothing further in the case until I see you again," or words to that effect, meaning, as respondent understood, that he would take no further action whatever in said suit till after he, respondent, and said Alexander should confer together, and have an understanding with reference to the progress and conduct of said suit. Respondent says, at the time of the said conversation so occurring on the capitol steps with said Alexander, the time of which he cannot more specifically state, but is satisfied it was in the month of January or February, 1861, he did not understand that any final order or judgement had been been taken against him in said suit, nor was it so treated or spoken of by said Alexan-
170 der, but, on the contrary, the impression was made on respond-

ent's mind, as said Alexander well knew at the time, that the action of the court was only inconclusive and interlocutory in its character, the vacating or setting aside of which might be readily obtained, & respondent allowed to answer and set up his rights and defence to said suit. And this respondent further says, that said Alexander, from the tenor and character of said conversation, well knew and understood that he, respondent, trusted to and relied on him not to take any steps whatever in said suit until he would see respondent again with reference to the same; but respondent says, as appears from the records of this honorable court, said complainants allege and claim that a judgement, final by default, was taken in this cause against him in the honorable district court of the United States, at Austin, sitting in chancery, on the 20th day of January, A. D. 1861, which, if already taken at the time of said conversation and promise as aforesaid of said Alexander, was subtely, artfully, and deceatfully concealed by him
171 from this respondent, and if taken subsequently to said conversation, must have been done a very short time thereafter and in flagrant disregard of the promises and assurances so as aforesaid made by said Alexander to this respondent, he, said Alexander, at no time after said conversation and said promise and assurance having had any conference or conversation with respondent on the subject of said suit or given him notice of any kind whatever in relation to the same till the service as aforesaid of said rule nisi, nor in fact did this respondent have any actual notice or knowledge of the rendition of what complainants set up and claim as a final judgement and decree of this suit against this respondent and his co-defendant, Herndon, of date of the 20th of June, A. D. 1866, till long after the same, as appears by the date thereof, was taken, had, and rendered, to wit, as respondent recollects, till probably the month of June or July, of the year A. D. 1868.

And here respondent begs leave to state and call to the attention of the court that, at the date of said pretended decree against him,
172 of the 20th of January, 1861, the count'y was on the eve of a great insurrection and revolution that very soon thereafter led to the terrible war between the State of Texas and other Southern States, resulting in almost a total suspension of all such business as this suit; and the honorable court itself, in which the suit was pending, was for a long time, probably five or more years next immediately succeeding said 20th of January, 1861, *was* suspended in all its powers and functions as a judicial tribunal, insomuch and so completely that during all said time no order, process, or session of said court was taken, issued, or held; and further, that the personal and social relations of parties, citizens of the same State and section, in some instances, were long suspended, which, to a very great extent, was unfortunately the state of feeling between said Alexander and this respondent, and also this respondent's said counsel, said E. M. Pease, esq., and himself, insomuch and to so great an extent that this respondent recollects no correspondence during all said time with either of them, further than of a mere casual and transient character. And respondent says that, being misled and de-
173 ceived by the agreements and conversations, with promises and assurances of said Alexander as hereinbefore stated, whether designed or not by said Alexander to mislead him and throw him off his guard, such was the effect thereof, and in consequence thereof, and from that cause only and the consequent influence had thereby on his said counsel, E. M. Pease, esq., of which respondent, as before stated, was till recently ignorant, he, this respondent, failed to make proper provisions and arrangements for the defence of said suit and to set up his

valid, legal, and equitable defences thereto before the commencement of said insurrection, rebellion, and war.

And this respondent further states that, since about the re-establishment of partial peace and quiet, and the re-organization of this honorable court, to wit, since June, 1866, and previous thereto; he has been subjected to great family and personal afflictions, he has had to mourn the death of a son, his own health for a long time lost, and for months so feeble that he was unable to leave his sick bed and room, till by care, affliction, mental suffering, and physical prostration, he, respondent, had hardly been able to give efficient and intelligent attention to make of his important business, and has, unavoidably, for the reason
174 aforesaid *been* had to leave much of it unattended to, to his great loss, and may seem culpably negligent in the present suit and for not having at an earlier day given his attention to it. But respondent most solemnly avows that it has been in no intentional or wilful contempt of this honorable court, its orders, decrees, or process, but for the reasons above stated, and those only, has his delay proceeded in responding to the orders and process of this honorable court, by obeying and carrying out the same, or produced to this court good and valid reasons why he should be exonorated and released from such obedience and performance, and also from setting up and showing to the court here that he has good and valid defence to the suit of said complainants, and to the enforcement of said alleged decree of the 20th of June, A. D. 1866, as against him, because respondent says:

1st. That complainants have not, and never had, any cause of action against him, said pretended grant under which they claim title to the land set out and described by them being but a right in composition to the Indians of the Mission of San José, granted by the authority of the government of Spain—was but a tenancy at will in said Indians;
175 and, as a title in fee to the said land, was and is null and void, as has been held and solemnly adjudged by the honorable the supreme court of the State of Texas, when brought before that honorable court at the suit of said John McMullen, under whom these complainants pretend to derive title in the case of McMullen vs. Hodge et als., of the 5th Tex. Rep'ts, pp. 34 and subsequent pages, to which case and the decision therein pronounced as aforesaid, respondent begs leave to refer and to read the hearing hereof.

2nd. That this respondent holds titles to the several tracts of land, probably five in number, and amounting in the aggregate to near 11,000 acres, contended by complainants to be embraced within the limits of said pretended grant set up by them, under patents from the government of Texas, granting to him the absolute fee to the soil from and under said State, all of which he is ready to exhibit and show to this court.

3d. Because said decree is void on its face, being founded on no cause of action, and no proof before the court upon which such a decree could rightfully, legally, and equitably be founded.

4th. Because said decree was procured to be rendered as against this respondent, without his having an opportunity to defend
176 said suit, and to set up his superior and perfect right to the land so far as claimed by him, by the contriving and promises by and with said Alexander, as the solicitor of said complainants—his promises and assurances as hereinbefore stated.

Wherefore this respondent having complied with the orders of this court as to matters of costs, by paying the same, and being ready and willing to do and perform such other or further orders in that regard as

this honorable court may deem proper and direct in consideration of the premises, this respondent most respectfully pray this honorable that he may be discharged, held purged of the contempt alleged against him, & set at liberty. And, further, this respondent prays the court, in consideration of the premises, will order & adjudge that the decree & judgement so set up by complainants, of date of the 20th of June, 1866, may be vacated, annulled, and set aside, and he, this respondent, be allowed, on such terms and conditions as to your honor may seem equitable and just, and within such reasonable time as your honor may name, to plead and answer said complainants' bill complaint against him, and to set up his defence thereto, and have
177 his rights passed upon by this honorable court, or that your honor will be pleased to regard this as a petition to be allowed to file his bill of review, or his bill in the nature of a bill of review of said decree and judgement and proceedings had therein; said bill of review or bill in the nature of a bill of review, to be filed in such reasonable time as this honorable court may name for that purpose, to the end that said proceedings, judgement, and decree, may be reviewed, revised, reversed, and corrected, and the just rights of this respondent upheld and secured to him, conformable to justice and equity. Or if this honorable court should deem it necessary that there should be a separate petition asking for permission to file such bill of review or bill in the nature of a bill or review, that your honor will so indicate and allow respondent's solicitors reasonable time to prepare and present the same, to the end that justice may be done. And further respondent saith not.

SAM'L A. MAVERICK.

HANCOCK & WEST,
Solic't. for Resp.

Sworn to and subscribed before me this 4th day of October, A. D. 1869.

M. HOPKINS, *Clerk.*

Affidavit of Sam'l A. Maverick. Filed October 4, 1869.
M. HOPKINS, *Clerk.*

178 The affidavit of E. M. Pease, filed with and in support of the foregoing affidavit of S. A. Maverick is in words to wit:

Affidavit of E. M. Pease.—Filed Oct. 4, 1869.

In the circuit court of the United States for the west. district of Texas, at Austin.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
HODGE & OTHERS. } No. 10. In chancery.

Affidavit of E. M. Pease, who, being duly sworn, says: Sometime in the summer of 1859 I was employed by Sam'l A. Maverick, of San Antonio, to defend a chancery suit, which had then been sometime pending in the United States district court, at Austin, and which now appears on the record of said court, in the name of Bainbridge Howard's Heirs against Archibald Hodge, et als., the said Maverick being one of the defendants. At the time I was so employed, a judgement pro confesso had been entered on the rule docket against said Maverick. I went at once to William Alexander, the solicitor for the plaintiffs, and made an agreement that said judgement should be set aside and further time given for said Maverick to answer. This was afterwards carried out,

when I made a written agreement with said Alexander by whi
179 further time was to be given for said Maverick to answer until
said Alexander should give me notice to file an answer in said cause. I rested upon the agreement and filed no answer, although I had one prepared ready for filing. Late in December, 1860, or in January, 1861, I was informed that a judgement pro confesso, for want of an answer, had been entered against said Maverick, in October, 1860. I went immediately to said William Alexander and asked how such a proceeding came to be taken without giving me notice, according to his written agreement. He replied that, in June, 1860, he had made another agreement in writing with Mr. Maverick, in person, by which he was authorized to do so. This was the first information I had received of any such agreement having been made with Mr. Maverick. I at once notified Mr. Maverick that, as he had made an agreement with the opposing counsel in regard to his case without giving me notice, I should not hold myself responsible for its management after the date of that agreement and that I would have nothing further to do with the cause.

The written agreement with said Alexander before named, as made by myself, was signed by him as solicitor for the complainants,
180 and was among my papers as late as the year 1862, but I am unable now to find it, and I believe it must have been destroyed during the year 1865 or 1866, while I was absent from my home, and during which time many others of my papers were destroyed.

E. M. PEASE.

Sworn to and subscribed by E. M. Pease before me, F. W. Sutor, a notary public for Travis County, State of Texas, and ex-officio United States commissioner, this 2nd day of October, 1869.

In testimony whereof I hereunto sign my name and affix my official seal.

F. W. SUTOR,
Notary Public, Ex-Officio U. S. Commissioner.

Affidavit of E. M. Pease. Filed October 4th, 1869.

M. HOPKINS, *Clerk.*

And afterwards, to wit, on the same day, October 4th, A. D. 1869, complainants filed their motion for writ of attachment against Branch T. Masterson, assignee in bankruptcy of Jno. H. Herndon, bankrupt, which motion is endorsed. "Filed Oct. 4, 1869. M. Hopkins, clerk;" and is in words, to wit:

181 *Motion of complainant for writ of attachment against Masterson, assignee of Herndon.—Filed Oct.* 4, '69.

In ch'cy. No. 10. Howard's heirs and Hodge & others. Mo. for attachment ag. B. T. Masterson, &c. Filed October 4th, '69.

M. HOPKINS, *Clerk.*

BETWEEN THE HEIRS OF BAINBRIDGE D. HOWARD, compl'ts,
and
ARCHIBALD HODGE & OTHERS, DEFENDANTS. } In chancery. No. 10.

In the circuit court of the United States for the western district of Texas, at Austin.

Russell Howard, one of the complainants in the above entitled and

numbered suit, in behalf of himself and his co-complainants, by his solicitor, moves that Branch T. Masterson, esq., as assignee of the defendant John H. Herndon, who is a bankrupt, be attached for an contempt of this honorable court because, after having been duly served with a peremptory order in the bankruptcy case of said Herndon, (which order was made by the judge now presiding at rules,) and, with a rule nisi issued in this suit, he has wholly failed to obey said peremtory order and the final decree in this suit; and he refers to said order, which is judicially known to the judge, and to the various orders made and papers on file in this suit in support of his motion; said writ
182 of attachment to be issued at once and made returnable at the first Monday of next term of this court, or as the judge may direct.

October rule-day, 1869.

ALEXANDER,
Solicitor for Compl't.

And, on the same day, to wit, Oct. 4, 1869, complainant filed his motion for alias attachment and writ of sequestration against S. A. Maverick, endorsed, " Filed Oct. 4, 1869," and is word', to wit:

183 *Motion of complainants for writ of attachment & writ of sequestration against S. A. Maverick.—Filed Oct.* 4, 1869.

Ch'y. No. 10. Between Howard's heirs and Hodge and others. Motion of complainants for alias attachment & seq. against def't Maverick. Filed October 4th, 1869.

M. HOPKINS, *Clerk.*

THE HEIRS OF BAINBRIDGE D. HOWARD, DEC', compl's, *and* ARCHIBALD HODGE, AND OTHERS, DEFENDANTS. } In chancery. No. 10.

In the circuit court of the United States for the western district of Texas, at Austin.

Russell Howard, one of the complainants in the above entitled and numbered suit, in behalf of himself and of his co-complainants, by his solicitor, moves that an alias writ of attachment be issued at once, returnable on the first day of the next term of this court, against the defendant Sam'l A. Maverick; and also that a writ of sequestration be issued at once, returnable on said day, directing sequestrators named therein to take possession of the real and personal estate of said Maverick, and the rents, issues, and profits of the same, until he has fully performed the decree, &c., in said suit. And, in support of this motion, reference is made to the papers on file, and orders made in this suit, and particularly to the affidavit filed by said Maverick
184 in answer to the rule nisi issued against him, and the return of the marshal upon the attachments issued against him which affirmatively show him to be in contempt for not obeying in all things said decree, &c., &c.

At October rules, 1869.

ALEXANDER,
Sol'c't's for R. Howard and his Co-complainants.

And, on the same day, to wit, Oct. rules, all of said motions were argued by counsel, and considered by the court, and thereupon the following order was filed, and is of entry upon the minutes of the court in words, to wit:

185 *Orders of court of Oct.* 8, 1869, *on preceding motions, &c.*

Circuit court United States, Austin. In chancery, Oct. 8, 1860. October rules, A. D. 1869.

HOWARD'S HEIRS *vs.* HODGE & OTHERS. } No. 10. In chancery. Circuit court of U. S., western district of Texas.

Rule nisi as to Masterson.

Upon more mature consideration than I could give the subject when the order was made by this court, on the 6th day of August last, imposing the rule nisi upon Masterson, as assignee of J. H. Herndon, I am inclined to the opinion that the same was improvidently granted. Under the provision of the bankrupt act and the powers given to that court, I believe it has the exclusive right, in the first instance, to enforce the decree rendered in the circuit court of this district against said Herndon, who is now in bankruptcy.

It appears from the answer of the assignee, Masterson, that he has done all that was required by my order, acting as district judge of the eastern district, and issued about the 12th June last, so far as stopping a sale of the lands therein mentioned was concerned, and has shown cause to that court why certain other portions of the order was not complied with, and which, showing that court has not yet considered
186 or acted upon. It is its exclusive province to do so, and, until it has so done, the circuit court of the district has no right, except upon petition or appeal, made under the provisions of the bankrupt act, to make any order in the premises. The rule nisi as to Masterson, assignee, &c., must be discharged at the costs of the compl'ts, and the motion of compl'ts for attachment be overruled, and it is so ordered.

Attachment as to Maverick.

When a party is attached for contempt he can do nothing more than purge himself of the same. Until this is done he can ask for no relief as against the proceeding under which the attachment issued.

So much of the answers of Maverick & others as set up matters for a bill of revivre are wholly disregarded so far as that object is concerned. They must first relieve themselves from contempt, and then, if they have the right to a bill of review, the same, together with their petition for that purpose, properly presented, will be considered by the court. I do not consider the answer of Maverick sufficient to exonerate him from the charge of contempt. He has not obeyed the decree of the court, which it was his duty to do w'ether that decree was right or wrong until it was reversed or reformed, either by ap-
187 peal, bill of review, or some other mode pointed out by the law. And so long as he is in contempt he is, I think, in no position to ask that the decree complained of should be reviewed.

But he offers to do now what the court may direct, and though he has

heretofore failed to obey the decree requiring him to cancel his patents conflicting with the lands adjudged to complainants, he now proffers his readiness to surrender them to the court for this purpose. This, I think, would be a virtual and substantial compliance with the decree. If, therefore, the said Maverick has the patents so conflicting in his possession now, and, on or before to-morrow morning, at 10 o'clock a. m., deposits the same with the clerk of this court, subject to the disposition of the court, or, if he has not the said patents now with him, will cause the same to be so deposited in ten days from this time, then either event, and on the further condition that he pay all costs accruing against him, the attachment under which he is held is hereby dissolved; otherwise he must be held in custody, and it is so ordered accordingly.

Rul' nisi as to Courand.

As Joseph Courand appears to have been no party to the proceedings, upon which the decree was had, and does not seem to be in privity of estate with any one who was a party, I believe the rule as to
188 him ought to be dismissed with costs, and it is so ordered.

Rule nisi as to J. Droitcourt, G. Inker, and Matthias Becker.

These parties, holding under J. H. Herndon, have made no sufficient showing in response to the rule, and attachments are awarded against them, returnable on the first day of the next regular term of this court. It is further ordered that a writ of attachment issue against Joseph Bandele, who has not answered at all, returnable as aforesaid.

(Signed) T. H. DUVAL, *U. S. Judge.*

OCT. 8TH, 1869.

S. A. Maverick, def't, files title papers and descriptive list of the same, Oct. 16, 1869.

And afterwards, to wit, on the 16th day of Oct., A. D. 1869, S. A. Maverick, defendant herein, deposited with the clerk of the court the following title-papers, descriptive list of which accompanying is endorsed, "Filed Oct. 16, 1869. M. Hopkins, clerk," and endorsed, "In ch'y. No. 10. B. D. Howard's Heirs vs. Hodge & others. Deposit of patents, and placing field-notes subject to order of the court, by S. A. Maverick, one of the def'ts;" and which descriptive list is in words, to wit:

In the circuit court of the United States for the western district of Texas, at Austin. In chancery.

Descriptive list of title-papers filed by S. A. Maverick, Oct. 16, 1869.

In obedience to the order of the hon. court, of the 8th of October, 1869, in case chancery No. 10, Howard's Heirs vs. Hodge & oth-
189 ers, I herewith deposit patent to S. A. Maverick, assignee of Gasper Florez, for one league and 1 labor entirely within the McMullen claim, (so called,) and the patent to Maverick, assignee of Raf'l Garza, for ⅓ lg., entirely within said old claim; and the patents to s'd Maverick as assignee of Juana Delgado, some 500 acres, (more or less,) of which, to wit, sur. 37, is included in s'd old claim, sent by me, said Maverick, to the clerk of the hon. circuit court of the U. S., at Austin. I also place in the custody of said court clerk, subject to the order of

the court, certificates, sets of field-notes, & titles for surveys on said old claim, lodged in the general land office by me, and known as file 1069, class 1, sur. 17, section 5, in the name of Francisco Leal, for 22.302172 labors; and also file 1279, class 1, for sur. 15, sec. 5, Antonio Chavaria, for 12.705120 labors, all of which are put by me at the future disposition of said hon'l circuit court in the case No. 10 in ch'y, B. D. Howard's vs. Hodge & others.

SAM. A. MAVERICK.

SAN ANTONIO, *Oct.* 13, 1869.

HANCOCK & WEST,
Solicitors for Def't Maverick.

And afterwards, to wit, on the 30th day of October, 1869, complainant filed his motion for alias writ of attachment and sequestration against the said S. A. Maverick, which is endorsed, "Filed Oct. 30, 1869. M. Hopkins, clerk."

190 *Motion of complainant for alias attachment and writ of sequestration against S. A. Maverick.—Filed Oct.* 30, 1869.

Ch'c'y. 10. Between Howard's heirs and Hodge & others. Mot. of counsel of compl'ts for alias attach'ts, &c., ag. def't S. A. Maverick and Hodge & others. Filed October 30th, 1869.

M. HOPKINS, *Clerk.*

BETWEEN THE HEIRS OF BAINBRIDGE D. Howard, dec., compl'ts, *and* ARCHIBALD HODGE AND OTHERS, DEF'TS. } In chancery. No. 10.

In the circuit court of the United States for the western district of Texas, at Austin.

Russell Howard, one of the complainants in the above entitled and numbered suit, in his own behalf and also in behalf of his co-complainants, moves the court to order, as of cause, that an alias writ of attachment and also a writ of sequestration be issued against Samuel A. Maverick, a defendant thereto, who is shown by the papers and records of said suit to be in actual contempt of this honorable court in that he has not in all things obeyed the final decree in said suit as by said decree and the subsequent orders made thereon in said suit he has been repeatedly required to do, said decree, &c., being unreversed, unsatisfied, and in full force. And in support of this motion of course complainants refer to the patents and papers which said Maverick had caused to be deposited with the clerk of this court; to the record of said suit,
191 and the papers on file therein; to a statement to be furnished by the commissioner of the general land office, to be filed in this suit when completed and obtained, and to such affidavits as may be filed in behalf of complainants before or at the hearing thereof.

And they set this motion for hearing on the rule day in December next, (A. D. 1869,) and, in case the judge of this court is not then in attendance, for the earliest day in the next regular term of this court that the court, in its discretion, may assign for a hearing thereof. (The words "a defendant thereto" interlined above before signing.)

ALEXANDER,
Sol'c't'r for Compl'ts.

AUSTIN, *October 30th*, 1869.

The clerk is instructed to file this motion, and to enter it at once on the chancery motion docket; also, on Monday next, the same being November rule-day, to note that it has been filed and docketed, and set for hearing on the chancery order or rule-book. The words, "and set for hearing," interlined.

ALEXANDER, *Sol'r for Compl'ts.*

OCTOBER 30, 1869.

And afterwards, to wit, on the 3d day of January, A. D. 1870, came Sam'l A. Maverick, def't, and the following entry was made at rules of January, 1870, to wit:

HOWARD'S HEIRS *vs.* HODGE ET AL. } 10. Ch'y.

And now come Hancock & West & Long, solicitors for def't Maverick & others, and file their petition for leave to file a blll to impeach & set aside decree & for injunction, &c., & deposit exhibits, &c.

M. HOPKINS, *Clerk.*

192 Which petition is endorsed & in words to wit:

In chancery. No. 10. Howard's heirs vs. Hodge & others. Sam'l A. Maverick's petition for leave to file, to impeach, & set aside decree for injunction, &c. Filed Jan'y 3d, 1870.

M. HOPKINS, *Clerk.*

Petition of Sam. A. Maverick to enjoin execution of decree and set aside same.—Filed Jan'y 3, 1870.

Circuit court of the United States, western district of Texas.

HOWARD'S HEIRS *vs.* HODGE & OTHERS.

Petition of Samuel A. Maverick for leave to file a bill to stay & enjoin execution of decree, to recall and annull the same as having been obtained by fraud, or in the alternative to reverse the same, as being erroneous in point of law & equity.

The petition of Samuel A. Maverick, one of the defendants in the above entitled case, humbly represents that the final decree in this cause against himself, & one John H. Herndon was obtained by default, through fraud, & wholly without defence made against the same by your petitioner or by any other party; that the same is unjust, inequitable & oppressive to him; that said decree, hereinafter more particularly described, ought, in consequence of said fraud in obtaining the same, to be recalled and annulled, as well on account of the fraud practiced
193 by complainants in the same upon the jurisdiction of this honorable court as a court of the United States & a court of equity, as also on account of false and fraudulent promises representations, & cunning devices practiced upon your petitioner by complainant, in said cause, through their solicitor, William Alexander, before the rendition of said decree by default, whereby your petitioner was prevented from filing an answer to the bill in said cause, & setting up his

defence thereto. Your petitioner further represents that he was, by the artful mechinations & cunning devices of said William Alexander, so acting as solicitor for complainants in said cause, put off his guard, and deceived, & prevented from sooner discovering & attempting to expose the said frauds so practised upon him, & did not, in fact, discover them until the last few months, namely, sometime in the fall of 1869. Your petitioner, having employed counsel for the purpose, has prepared a bill, as he has been advised was proper in the case, setting forth in detail the frauds complained of in procuring said decree & the errors therein supposed to exist, which bill & the exhibits thereto are hereto attached
194 as part of this petition to prevent repetition & prolixity, which he prays may be read in this behalf for information; which said bill has been verified by the oath of your petitioner, & ought to be considered in determining the question of leave to file & exhibit the same in this honorable court. Petitioner further states that he has fully obeyed & complied with the order rendered in this cause on the 8th day of October, 1869, allowing him to deposit with the clerk of this court the patents and other evidences of title in his possession, which were, by said decree, ordered to be cancelled, subject to the order of this court; that the same were deposited within ten days from the date of said order, to wit, on the 16th day of October, 1869, & all the costs taxed against him had also been duly paid as directed by said order, as conditions precedent to leave to file this petition & to his discharge from the attachments for contempt, &c.

Whereupon, petitioner prays that, in tender consideration of the premises, leave to exhibit & file said bill in this honorable court be granted him, to the end that the same may be heard & finally decided upon its real merits, as may best accord with equity & justice.

HANCOCK & WEST,
LONG & PRICE,
Solicitors.

195 STATE OF TEXAS, *Travis County:*

Personally appeared before the undersigned authority, Samuel A. Maverick, the complainant in the foregoing bill of complaint, and, being by me duly sworn, on oath says that the matters and things in said bill set forth are, where stated of his own knowledge, true, & where stated as upon information, he believes them to be true.

Sworn to and subscribed before me, this 3d January, 1870.

WESTON ROWAND,
U. S. Commissioner.

And at the same time with the petition of S. A. Maverick, filed January 3d, 1870, and referred to in said petition and made part of the same, was deposited with the clerk, for the inspection of the court, draft of the proposed bill, duly signed by S. A. Maverick, and sworn to before a United States commissioner; which bill is in words, to wit:

196 *Bill of S. A. Maverick, deposited with the clerk, and made part of the foregoing petition.—January* 3, 1870.

UNITED STATES OF AMERICA:

Western district of the State of Texas, fifth circuit. In chancery.

To the hon. the judges of the United States circuit court for the said western district, sitting as a court of equity, at Austin, Texas, in fifth circuit.

1st. Samuel A. Maverick, a citizen of the State of Texas, & a resi-

dent of the county of Bexar in said State, as complainant herein, brings this his bill of complaint against Volney E. Howard, who is a citizen of the State of California; Russell Howard, who is a citizen of the State of Texas, and resides in said State, in the said county of Bexar; Thomas H. Bennett & his wife, Caroline H. Bennett, (formerly Caroline Howard,) Ephraim H. Lombard, & his wife, Julia A. Lombard, (formerly Julia Howard,) and Mehitabel Howard, the said Bennett and his wife Caroline, the said Lombard, & his wife Julia, & the said Mehitabel Howard, each of them are citizens of the State of Illinois; & John
197 McMullen, Antony McMullen, James McMullen, Peal McMullen, Ann McMullen, Morris Egan, & Margaret Egan, (formerly Margaret McMullen,) the said last named parties, that is to say, the said John, Anthony, James, Peal, and Ann McMullen, as well as the said Morris Egan & the said Margaret, are each of them citizens of the State of Pennsylvania; and Branch T. Masterson, assignee in bankruptcy of one John H. Herndon, the said Masterson, being a citizen of the State of Texas, & a resident of the county of Galveston in said State.

2nd. And thereupon humbly complaining showeth unto your honors, your orator, the said Samuel A. Maverick, that, on the 17th day of February, A. D. 1851, and continuously for a considerable period prior to that time & subsequent to that date, down to the date of this his bill of com plain*ant*, your orator held & still holds a vested interest according to t he laws of Texas in certain lands in the said State of Texas situated in the county of Bexar, which lands are known and designated as follows on the maps of the said county in the general land office of the State: Survey No. 17th for $\frac{22}{10}\cdot\frac{302}{000}\ \frac{172}{000}$ labors, (being 39.50½ acres,) held by virtue of a valid & genuine approved and recommended land certificate,
198 originally issued to Francisco Leal; survey No. 15, for 12, $\frac{705120}{1000000}$ labors, (being 22.50½ acres,) held by virtue of a valid, genuine, approved & recommended land certificate originally issued to Antonio Chavaria. Also, survey No. 13, patented to Samuel A. Maverick, as assignee of Gaspar Flores, for one league and labor being 4605 acres. Also, survey No. 16 patented to Samuel A. Maverick, as assignee of Raphael Garza, for one-sixth of a league, being 738 acres. Also, about five hundred acres, more or less, in survey No. 38, patented to Samuel A. Maverick, assignee of Juana Delgado, being so much land covered by said patent as conflicts with the said pretended McMullen claim hereinafter mentioned.

Your orator further shows that of the above described surveys, *that* he was seized in fee of a part & of the remainder he was equitably possessed, the legal title to the same not having yet passed to your orator from the State of Texas, & was & is the true owner of all of them.

For a more particular and full description of the above-named tracts of land ref'rence is made to the field-notes & patents for the same, which will be filed during the further progress of said cause & duly exhibited to the court on the hearing of the same.

199 3d. Your orator would further show that, on the said 17th day of February, 1851, & for some time prior to that date, & for a considerable period subsequent thereto, that the said John Herndon, now a bankrupt, had also an interest & was the owner, but by what precise character of title your orator is not fully informed, of certain other surveys of land in the said county of Medina, in said State of Texas, near or adjoining to the said surveys owned by your orator, but held by the said Herndon by a right wholly distinct from your orator; & your orator states that the said Herndon had no interest of any kind whatsoever in the said survey above referred to, held & owned by your orator

and your orator no interest of any kind whatsoever in the surveys & lands held & owned by the said Herndon, near & adjoining those of your orator; & he further avers that they each held & claimed, by virtue of right & titles wholly distinct & independent of each other or of any other person whomsoever.

4th. Your orator further shows that, on the 25th day of July, 1845, one John McMullen, who was a citizen of the State of Texas, instituted in the district court of Bexar County, Texas, an action of tresspass to try title against one Archibald Hodges M. M. Battle, George W. Price, & R. C. Garza, alleging the said parties to have committed trespasses on the same land & within the same metes & bounds as
200 that embraced in the above-described surveys of your orator; & also to have committed trespasses on the same land embraced within the metes & bounds of the said surveys of the said bankrupt John H. Herndon.

5th. Your orator further shows that said suit was not prosecuted to final judgement as against the said Hodge, Battle, & Garza, but as to them was abandoned, & a trial was had of said cause in the said district court of Bexar County, between the said John McMullen & the said George W. Price, in which said suit the said McMullen was cast, & a judgement was rendered in said court in favor of said Price on the 29th of April, 1847, from which said judgement, deciding adversely to the title of the said McMullen, he appealed to the supreme court of the said State of Texas, sitting at Austin, Texas.

6th. Your orator further avers that, in said suit, & for the maintenance of his title to the land in suit, the said McMullen relied solely for his title upon a pretended grant, alleged to have been made on or about the 22nd day of November, 1766, by the government of Spain, according to the forms of law & by the regularly constituted offi-
201 cers of government, to the Indians of the population of the Mission of San José, said land so pretended to be granted being alleged and claimed by the said McMullen to be situated partly in what is now the county of Medina in said State of Texas, but which formerly, on the 25th day of July, 1845, was wholly within said county of Bexar, and was bounded as follows: Beginning at the top of Padron Hill; thence running from the north to the south, to the creek called the Alamos, at the crossing thereof, where there was placed a land-mark, near the road leading to the presidio of Rio Grande; thence along the road westwardly to the arroyo or creek Palahina, where there was placed a land-mark; thence turning toward the north to the road that comes from the cañon to the Loma Alto, where was placed a land-mark by piling stones, a short distance from the land-mark of Baltazar Perez, an adjoining proprietor; thence following an east course to the said Padron Hill, the place of beginning.

7th. Your orator further shows that, in support of his said title to the said land so pretended by the said John McMullin to be granted in fee to the said Indians aforenamed, the said John McMullen sought
202 & pretended to deraign title to himself through & from the said Indians aforesaid, and did not pretend to assert or claim title in any other manner or from any other source.

8th. Your orator further shows that the said pretended grant, with the metes & bounds aforesaid, together with all the evidence to establish the said pretended chain of title from the said Indians aforesaid to the said John McMullen, were all duly & fully & at length set out in the statement of facts contained in the transcript of the said appeal of the said John McMullen; & that, at its October term, 1849, sitting at

the city of Austin, Texas, the supreme court in all things affirmed the said judgement rendered in favor of the said Price & against the said McMullen, & expressly held and decided that, by the laws then in force & now in force in the State of Texas, *that* the said pretended grant above herein set forth did not convey the fee in said lands to said Indians, & that said grant conferred only an inchoate & imperfect right to the land therein described, & that the same was not recognized as a valid grant in fee by the laws of the Republic and of the State of Texas;

& that, at the declaration of the independence of Texas, & of
203 the establishment of her separate nation*ability* as a republic, & her recognition as such, that said pretended grant, not being itself a grant in fee, & being in no way validated or confirmed by the successful government, that it conferred no fee or property on said Indians, & that they could convey none to the vendors of the said McMullen or to said McMullen himself, & that said title conferred no cause of action on the said McMullen or any other person, & that the land purporting to be contained within its limits constituted a part of the public domain of the Republic & of the State of Texas.

9th. Your orator further shows that, in affirming said judgement the supreme court held that the location of the head-right certificate, under which the said George W. Price claimed title to the land, was a valid location, & conferred title to said land on the said Price; & they further expressly held that, even had the pretended grant been valid, that the said McMullen wholly failed to show that he held the title to the same from the said Indians or any one else; & that the said grant was a nullity; & that the said McMullen, under the laws of Texas, had no

cause of action whatever, in law or equity, by virtue of said pre-
204 tended grant.

10th. Your orator further shows, that the said judgement of the said district court of Bexar County, & the said judgement of the said supreme court of the State of Texas, affirming the same, have never been annulled, vacated, overruled, or, in any manner whatever, set aside, & that they are now in full force & effect, & constitute the law of real property in the State of Texas, as to the said pretended grant of land to the said Indians of the population of the said mission.

11th. Your orator further shows that, notwithstanding the said affirmance of the said judgement by the said supreme court of Texas, on the day of October, 1848, that, on the 5th day of November, 1849, only days after the said supreme court of Texas had declared said grant to be an absolute nullity, the said John McMullen, conspiring with & prompted by the said defendant, named herein, Volney E. Howard, & also conspiring with one Bainbridge D. Howard, a brother of the said Volney E. Howard, & with other persons unknown to your orator, with

a view to cheat & defraud the said George W. Price, your orator,
205 the said def't John H. Herndon, the said A. Hodge, M. M. Battle, & many other persons, & in order, by fraud, to vest jurisdiction in the Federal courts of the United States in Texas, then having cognizance and jurisdiction of such causes in Texas, fraudulently & falsely, & with a design to practise a fraud upon the said parties named, & others, & with a view to illegally & fraudulently vest jurisdiction, as aforesaid, in the Federal court sitting in Texas, did, without a full & valuable consideration, & with the fraudulent purpose aforesaid, on said last day named, (5th of November, 1849,) pretend to convey to the said Bainbridge D. Howard, who was then a citizen of the State of Louisianna, his entire interest in the said land heretofore set out herein by metes and bounds, being the same pretended grant from the govern-

ment of Spain to the said Indians named, declared by the supreme court of Texas to be a nullity.

12th. And your orator further shows unto your honors that, in pursuance of their said fraudulent design, the said Bainbridge D. Howard, acting in conjunction & in conspiracy with the said parties herein named, did, through his solicitors, the said Volney E. Howard &
206 one Robert Hughes, (now deceased,) file in the United States district court, at Galveston, Texas, on the chancery side thereof, on the said 17th day of February, 1851, an original bill, in the nature of a bill to quiet title & remove clouds, as sole complainant against the said Archibald Hodge, the said Miles M. Battle, the said George W. Price, the said R. C. Garza, the said J. H. Herndon, your orator, one James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, James A. Mason, & W. E. Howth, in which said bill he set up by metes & bounds, & expressly by description & date, the same pretended grant from the government of Spain to the said Indians of the Mission of San José, heretofore referred to, & sought a decree confirming the same & quieting his possession of the same.

13th. Your orator further shows that, in addition to the false allegation contained in said bill, that the said complainant B. D. Howard was seized in fee, when, in truth & in fact, he was not seized in fee, & was not the owner of said land, but the pretended title to the same was then in the said John McMullen; the said B. D. Howard,
207 further advised & instigated by the said Volney E. Howard, fraudulently asserted in said bill that he was in the actual possession of the said land, when, in truth & in fact, neither he nor his agents were in actual possession of the same at the time of the filing of said bill; & he further falsely alleged, that he had joined all the parties above named to prevent a multiplicity of suits, when, in truth, as your orator here shows, & charges the facts to be, that the said Howeth, Hodge, Battle, Price, Garza, Hudson, Luckie, Richardson, Smith, and Mason were never really more than mere nominal parties to said bill; that no orders or decrees were ever taken against them, & the bill was finally dismissed as to them; that there was no common interest or privity of interest existing between any two of the said defendants named, & that this fact was well known to the complainant in said bill, & especially to the said def't Volney E. Howard, at the filing of said bill; & that said parties were falsely, fraudulently, & improperly joined in order to deprive the defendants of their just rights to a trial
208 by jury at law.

14th. Your orator further shows that the said James A. Mason, & the said Willard Richardson, never had, at any time, any interest in the said land of any character, & never were in possession of the same in any manner.

15th. And your orator further avers that, at a subsequent period the said complainant dismissed his said bill as to all the said parties whose names were so fraudulently inserted in said original bill, & your orator here in this connection makes a copy of said original bill and *exhibit & files the same herewith, & asks that the same may be known as Exhibit No. 1, and as such may be referred to as often as may be necessary & proper in the premises.

16th. Your orator further shows that, in the autumn of the year 1851, the said Bainbridge D. Howard departed this life, & that by his death

* See bill, 2 page of transcript.

the said suit in ch'cy stood abated from the said date, until, by leave of the court, on the 29th of June, 1860, or a short period anterior thereto, in the United States district court, at Austin, Texas, in the western district of Texas, to which court the said cause had been transferred,
209 a supplemental bill & a bill in the nature of a bill of revivor was filed by the said Volney E. Howard, the said Thomas H. Bennett, the said Caroline, his wife, the said Ephriam H. Lombard, & the said Julia, A. his wife, & the said Mehitable Howard, pretending in part to hold by purchase from one Russell Howard, and also claiming to be the heirs of the said B. D. Howard, deceased, & alleging the death of the said John McMullen which your orator charges to have occurred between the said 5th day of November, A. D. 1849, & the said 29th day of June, 1860; but at what precise date your orator is not advised; & also pretending in said supplemental bill in pursuance of the said conspiracy to make his heirs parties, without stating the date of the death of the said McMullen, or giving any of the names of said heirs or the places of their residence; & in furtherance of their said fraudulent purpose & with the design & intent to cheat & defraud your orator & the said John H. Herndon, said original bill was not revived as to the said Howth, Battle, R. C. Garza, Luckie, Herndon, Mason, & Hodge; &, with the intent still to practice a fraud upon the jurisdiction
210 of the court, a new party by the name of Francis Wurzbach, who never had any interest in the subject of the suit, & who was improperly made a party without the special leave of the court being obtained, was pretended to be made a defendant, but as to whom, no final decree was had, & the bill dismissed, & whose name was used, as was also the names of the other defendants to said original bill & to said supplemental bill & bill of revival, except the said Herndon & your orator, for the purpose of deceiving the court as to the pretended multiplicity of suits, & in order to deprive your orators & the said John H. Herndon of their right of a trial in a court of common law, & before a jury; all of which matter, & others of like import, will more fully & at large appear from a copy of said supplemental bill & bill of revivor herewith filed and marked *Exhibit No. 2, & prayed to be taken as a part of this bill & to be referred to in this connection as often as may be proper & necessary in the premises.

17th. Your orator further shows that, in the furtherance of the said fraudulent purpose of their said ancestor, the said defendants to this bill herein named, to wit: The said John, Antony, James, Neal,
211 & Ann McMullen, Morris Egan & his wife, Margaret, (formerly Margaret McMullen,) all of them, though non-residents of the State of Texas, & citizens of the State of Pennsylvania, and without their names being inserted in the said bill or any process issued with the fraudulent purpose of aiding & assisting the said Volney E. Howard, Thomas H. Bennett, Caroline, his wife, Ephriam H. Lombard & Julia, his wife, & Mehitabel Howard, claiming by purchase, & as the heirs of the said Bainbridge D. Howard, & being instigated to the same, as your orator is informed & believes, & therefore so states, by the said defendant Volney E. Howard, voluntarily entered an appearance & pretended to admit in their said answer all the facts alleged in said original & supplemental bill, & submitted themselves to the jurisdiction of the court, & consented, fraudulently & with the design aforesaid, that a decree without evidence or enquiry might be rendered against them, which said answer was filed on the 15th day of January, A. D. 1861, & a copy

* See page 45 for supplemental bill.

of which is herewith exhibited as Exhibit* No 3, & is prayed to be taken & considered as part of this bill, with leave to refer to the same as often as may be proper or necessary in the premises.

212 18th. Your orator further shows that, from the date last mentioned herein, the said defendants herein named & set forth, claiming by purchase from the said Russell Howard & others & as heirs of the said Bainbridge D. Howard, deceased, in conjunction with the said defendants hereto, being John McMullen, Anthony McMullen, James McMullen, Neal McMullen, Ann McMullen, Morris Egan & his wife, Margaret, (formerly Margaret McMullen,) & claiming as the heirs of the said John McMullen, deceased, in furtherance of their said fraudulent design to deprive your orator & the said John H. Herndon of their said land by means of interlocutory orders & decrees pro confesso, rendered improvidently, & and for the most part ex parte, & without jurisdiction or power in the said court to render the same, did, up to the 25th day of June, 1860, obtain various orders & decrees, which it is not necessary to set forth more specifically here, but to each & all of which in support of his said bill your orator begs leave to refer as often as may be necessary during the progress of said cause, on which said last-named day all of said orders & de-

213 crees were set aside by a pretended agreement in writing to which the signatures of your orator & of the said Herndon through his solicitors was attached, but though in the hand-writing of the solicitor of the complainant, in said bill, (William Alexander, esq., who had taken the place of the said Volney E. Howard, who had become a citizen of California, & the said Robert Hughes, in the conduct & management of said cause, & who still has, & at all times since his connection with said cause has had, the chief control & almost exclusive management of said cause as the solicitor for the complainants in said suit,) was, for some reason not fully known to your orator, not signed by the said complainants or by their solcitor, by which said agreement, among other things, it was stipulated that an order, entered on the 5th day of September, A. D. 1859, taking the said bill pro confesso as to your orator, be set aside, & leave be given, within a certain period, to the said complainants to file a supplemental bill in the nature of a bill of revivor, (said original bill never having been properly & legally revived, as your orator is advised.) It was further stipulated, among other things, that your

214 orator should appear without further process, & that the time to answer should be extended (among others) to your orator until the third rule-day after the filing of said supplemental bill, to answer the same, all of which will more fully & at large appear from a copy of said agreement, herewith exhibited, & marked Exhibit† No. 4, & prayed to be taken as a part of this bill, & to be referred to as often as may be necessary & proper in the premises.

19th. Your orator further shows that, long prior to the date of said agreement, and sometime during the summer of 1859, he had retained as his solicitor & counsel, E. M. Pease, esq., who was fully advised in all respects as to the character *of* nature of the defences of your orator, & who had prepared himself fully as to both the principles of law & equity applicable, & who, for sometime prior to the 20th day of June, 1860, had prepared such answers as he deemed necessary & sufficient to protect your orator's rights in the premises, & would have filed the same in accordance with the rules governing the practice in courts of chancery in ample time; but your orator here shows to

* For answer of McMullen's heirs see page 59 of transcript.
† For agreement, see page of transcript.

your honors, that, in order that they might deprive your orator of
215 his right to make defence in said suit, & to prevent him from pleading the aforesaid fraud, herein set forth, practised by the said complainants in said suit in chancery, upon the jurisdiction of said court, to the great damage & in*quiry* of your orator, the said complainants in said suit in chancery heretofore herein named, acting through & by their said solicitor, the said William Alexander, esq., with & in pursuance of the said fraudulent design & purpose aforesaid, & with a view to obtain by some unfair means, a pretended recognition in court of the legality of their said void grant, & to evade the laws of Texas declaring said grant null, & to enable them to procure ex parte in said cause, as your orator believes & so charges, by fair promises, induced the said E. M. Pease, esq., as solicitor, to enter into a written agreement with said complainants, through the said William Alexander, esq., their solicitor, to the effect, that all the previous orders as to your orator, of all kinds whatever, in said cause should be set aside; that further time should be given
216 to your orator to file his answer, until the said Alexander should give notice to the said solicitor, E. M. Pease, esq., to file said answer for your orator, although as aforesaid an answer had been written out & prepared for your orator by the said E. M. Pease, esq., and the same was ready to be filed upon the notice of said Alexander.

20th. Your orator further shows that, having the utmost confidence in the integrity & capacity of his said solicitor, & also having, at that time, by reason of long-existing personal friendship between your orator and the said William Alexander, unbounded faith in his integrity, your orator, being much immersed & almost wholly pre-occupied with the management of his own private affairs, after retaining the said E. M. Pease, & entrusting him with the management of said cause, did not deem it necessary further to concern himself with said cause, & your orator's solicitor having the *the* like confidence & trust in the said William Alexander, and having in his possession the written agreement signed by the said Alexander to the effect aforesaid, & having the answer & defense of your orator ready & prepared to file upon notice being
217 given to him, in accordance with said written agreement aforesaid, did not notify your orator of the existence of said agreement, & your orator was wholly ignorant of its existence when the said Alexander, as your orator believes and charges, with the design & purpose to place your orator off his guard, & to take an unconscientious advantage of him, on the said 20th of June, 1860, approached your orator, & concealing from him the existence of the said written agreement heretofore set up as made & entered into between the said Alexander & the said Pease, & in & during the temporary absence of the said Pease from the State of Texas, & when your orator could not correspond or communicate with him, & representing himself to your orator as the bearer of a friendly message from the said Pease to your orator, to the effect that the said Pease would soon return from his trip to the North, & be ready, as your orator now remembers, for the trial of said cause, at the same time the said Alexander, craftily designing & purposing to carry out the fraudulent design originally contrived by the said defendants Volney E. Howard & the said Bainbridge
218 D. Howard, deceased, & the said John McMullen, deceased, & heretofore set forth in this bill, represented to your orator, as his pretended personal friend, that it would be to your orator's advantage, in getting rid of certain interlocutory orders heretofore rendered against him in said cause, to sign said agreement, & reiterating to your orator the assurances that his said solicitor, E. M. Pease, esq'r., would certainly

return from the North in time to take charge of his said suit, he induced your orator to sign the said agreement heretofore set out herein, & exhibited herewith as Exhibit No. 4.*

21st. Your orator further shows that the agreement made by your orator was never communicated by your orator to the said Pease, believing that he would try the cause at the next term, as stated by the said Alexander, & that the said Alexander failed to communicate to the said Pease the existence of said agreement of the 20th of June, 1860, made by him with your orator.

22nd. And your orator further says that the said Alexander
219 failed to communicate to your orator the previous written agreement made with the said E. M. Pease, to the effect as aforesaid that no answer need be filed until the said Alexander should notify him to do so.

23d. Your orator further shows that he believes, & so states the fact to be, that the said complainants aforesaid in said suit, through their solicitor, the said William Alexander, purposely & intentionally as aforesaid concealed the said facts as to said agreements from your orator & from the said Pease, respectively, with the fraudulent design & purpose of depriving your orator of his right to make a defence to said suit, & with a view of enabling them to proceed & take, as against your orator in said suit, a decree pro confesso.

24th. And your orator further shows that, in the further prosecution of the said fraudulent purpose of the said complainants, both your orator & the said E. M. Pease, his solicitor, having been put off their guard by the artful machinations & deceitful representations of the said complainants, through the said William Alexander, as herein heretofore detailed, practising upon their confidence & trust in him,
220 the said complainants, beforenamed, through their said solicitor, did, on the 1st day of October, 1860, take a decree pro confesso against your orator, without the knowledge of your orator or his said solicitor, the said E. M. Pease.

25th. And your orator further shows that, in the further prosecution of their said fraudulent purpose, that the said complainants, in the said suit, who have heretofore been named herein, & whose names are here omitted, to avoid prolixity & repetition, did, on the 30th day of January, 1861, pretend to take, among others, what was styled by them a final decree against your orator, pretending to establish said pretended grant, and attempting by its terms to destroy all the right & title of your orator in the premises; a copy of which said decree is herewith exhibited, & marked Exhibit No. 5, † and is asked to be taken & considered as part of this bill, with leave to refer to the same as often as may be necessary.

26th. Your orator further shows that he is informed & believes, & so states, that, on said pretended hearing, at which said pretended final decree purports to be entered, that no title of any kind was ex-
221 hibited by the complainants as against your orator; that no evidence, of any character, was introduced, nor were the pleadings of the complainants read to the court, or any investigation had, but that said decree was rendered, as of course, all the pretended evidence of right, in said complainants, so far as your orator was concerned, being concealed from the court, in the absence of your orator, for the purpose of obtaining, as aforesaid, by means of ex parte repre-

* For agreement, signed by Maverick, see page , transcript.
† For decree, see page 73, transcript.

sentations & decrees pro confesso, rendered without evidence, a pretended & merely nominal recognition by judicial authority of the void & illegal & pretended grant set up by said complainants, as herein before set forth.

27th. Your orator further shows that, during this period, he was wholly ignorant that any such ex parte proceedings had been had, & believed that he was being represented in said cause by his solicitor, E. M. Pease. But your orator shows that, some time in the month of October, 1860, that the said complainants, through their said solicitor, entered upon the rule-book the usual preliminary order in form
222 in vacation, taking said bill as confessed, as before stated, as the same pretended order which was at the said July term, 1861, pretended to be made absolute, as herein set forth, & that when the said action came to the knowledge of your orator's solicitor, the said E. M. Pease, that he sought out the said Alexander, & demanded of him an explanation of his conduct, & reminded him of the written ageement existing between the said solicitor, as before herein set forth, by which notice was to be given to your orator or his solicitor when it would be necessary for your orator's answer to be filed; & that then, for the first time, the said Alexander disclosed to the said Pease the fact that he had, without the knowledge of the said Pease, & in his absence from the State, sought out his client, your orator, & made with him the agreement, dated 20th of June, 1860, & heretotore referred to; & that said agreement being made known to the said Pease, that he wrote at once to your orator declining all further connection with this said cause, which said letter your orator never received, & which was written
223 to your orator by the said Pease, under the false impression, created intentionally, as your orator believes & so states, by the said complainants that your orator had a full knowledge of the previous agreement made by the said Pease with the said Alexander, when the truth was that your orator was not then aware that any such agreement existed, the said Alexander having failed to inform your orator of it, &, for the reasons before stated, his solicitor had never made it known to your orator; & thus it occurred that your orator, not being aware that his solicitor had abandoned his said cause, but supposing that he had counsel, was wholly prevented from setting up his meritorious defences to said suit, the main grounds of which defences, & which were prepared by his solicitor, & ready to be filed, were the illegality & nullity of said pretended grant, the want of title in the said complainants, the want of jurisdiction in a court of chancery over the subject-matter, it being properly & legally cognizable in a court of common law, & the said attempted frauds sought to be practised on the
224 jurisdiction of the said court.

28th. Your orator, in the same connection, further shows that said original answer, so prepared for your orator, as well as the said written agreement entered into by his said solicitor with the solicitor of complainants, have been, while in the possession of the said Pease, consumed by fire, or destroyed in some other manner, unintentionally, during the latter part of 1865 or early in 1866, & that no copy of either said answer or said agreement are now in existence, unless the said complainants or their said solicitor may have a copy of the said agreement referred to, & for greater certainty, your orator begs leave to attach hereto & make the same a part of his said bill, as an *Exhibit No. 6, copies of two affidavits heretofore made in the progress of said chancery cause by your orator & the said Pease, & asks that the whole of said

* For affidavits, see page 161–180, transcript.

affidavits may be referred to as often as may be necessary & proper in the premises.

29th. Your orator further shows that, sometime in the month of January or February, 1861, he received information that the said
225 complainants, through their solicitors, were taking some orders in said cause, but your orator was not advised at the time fully as to their character; that your orator met the said William Alexander in the city of Austin, on the steps of the capitol, in said city, & conversed with him, the said Alexander, in relation to the said cause & of the orders that he had heard had been taken in the same, & of the said written agreement under which he understood they purported to have been taken. Respondent earnestly appealed to the sense of justice of the said Alexander not to take any advantage of him, your orator, by means of said agreement, reminding him that it had been signed by your orator in confidence, & wholly at the instance & through the persuasion of said Alexander, under the full impression that *a* was a friendly expedient by which the cause was to be tried upon its merits, regardless of mere technical defaults or omissions of form by both parties to the same. To this appeal the said Alexander, seeming to be touched by the same, replied to your orator: I will do nothing further in the cause until I see you again, or words of that import, meaning, as your orator understood, that he would take no further action in said
226 suit until after your orator & said Alexander should confer together, & have an understanding with reference to the progress & conduct of said suit. Your orator further says that, at the time of said conversation so occurring on the capitol steps with said Alexander, (the exact time of which he cannot more specifically state, but is satisfied it was in the month of January or February, 1861,) he did not understand that any final order or judgement or decree had been taken against him in said suit, nor was it so treated or spoken of by said Alexander, but, on the contrary, the impression was made on your orator's mind, as the said Alexander well knew at the time, that the action of the court was only inconclusive & interlocutory in its character, the vacating or setting aside of which might be readily obtained, & your orator allowed to answer & set up his rights & defence to said suit. And your orator further states & charges that, from the tone & character of said conversation, the said William Alexander well knew & understood that your orator trusted & relied upon him not to take any step whatever in said suit until he would see your orator again
227 with ref'rence to the same. But your orator says (as appears also by record of this court) that a judgement or decree, in form final by default, was taken against him in said cause in the district court of the United States at Austin, sitting in chancery, on the 20th day of January, 1861, which, if already taken at the time of said conversation & promise as aforesaid of said Alexander, was subtly, artfully, & deceitfully concealed by him from your orator, & if said judgement or decree was taken subsequent to said conversation, must have been a very short time thereafter, & in flagrant disregard of the promises & assurances so as aforesaid made by said Alexander to your orator, who solemnly avers that said Alexander, at no time after said conversation & promises, & assurances, had any conversation or conference with your orator on the subject of said suit, nor did the said Alexander give your orator any notice of any kind whatever in relation to the same until your orator was served with a rule nisi for alleged non-execution of said pretended final decree, &c. Nor, in fact, did your orator have any actual
228 notice or knowledge of the rendition of what complainants set up

& claim as the final decree in the suit against your orator, and his co-defendant Herndon, of the date of the 20th of June, 1866, until long after said date, & probably, as your orator recollects, in the month of June or July, 1868. And your orator avers & charges that he was in fact deceived by the false & fraudulent statements, concealments, & cunning devices of said complainants, through their said attorney, put off his guard, & actually prevented from taking such steps, then in his power, as would have prevented the injury now complained of, & enabled him to have discovered & exposed the said fraud, & to have succeeded in getting said default decree opened, & the cause fairly tried on its merits.

30th. Your orator further states that, about the time of the conversation hereinbefore related & continuously thereafter, the great social and political convulsion through which the country has since passed was being inaugurated, whereby all personal & professional relations were broken up & severed, not only between families & friends generally, but between the said E. M. Pease & your orator, & also the said
229 Alexander & your orator, &, in fact, driving from the minds of men all recollection of their private affairs, & rendering it impossible to give attention thereto, all the courts being closed to all civil business. Your orator was thus prevented by the overwhelming force of these circumstances from giving attention to his lawsuits or other affairs of a private nature, & driven by the force of the circumstances wholly to devote himself to the preservation of civil society which was indeed convulsed to its very centre, & threatened with the greatest perils, & even with utter destruction, so that, in point of fact, it was absolutely impossible for your orator to have sooner discovered & sought to expose the frauds, deceits, & cunning machinations, by means of which the said final decree by default was obtained in favor of said complainants against your orator & the said John H. Herndon without a hearing.

And, in this connection, your orator further states that, when at length this desolating storm of war had passed over, & in a measure spent its force, he found himself stricken in years, feeble in health, his spirits broken, all his large private interests of all kinds in c'aotic confusion, part of his property gone forever, & a part thereof in the
230 hands of the Government, severe domestic afflictions, the loss of a son, protracted & dangerous illness on his own part during the years 1866, 1867, 1868, 1869; the local State government unsettled, & frequently changing in its character; your orator, in fact, had neither the time nor the health to give due attention to any of his private affairs. Your orator is advised & begs leave to suggests & rely upon these facts & circumstances, which are historical & familiar to all, (but can be specifically proven if required) as accidents over which he had no control, & which this honorable court will regard as fully excusing any apparent neglect of his interest in said suit, & of which it is at once immoral & inequitable for complainants to avail themselves in furtherance of their said fraudulent design, &c., to the prejudice of your orator's right of property in the premises.

31st. Your orator further represents that the so-called & pretended final decree by default in this said cause was rendered in the district court of the United States, at Austin, on or about the 25th day of January, 1861, as hereinbefore stated & exhibited, & a ref'rence made to the master of said court, upon whose report to base some subsequent order or decree. Yet that, on or about the 18th day of June,
231 1866, there was also rendered in said cause what purports to be a

further pretended final decree in the circuit court of the United States, at Austin, which is herewith exhibited as a part hereof marked Exhibit No. 7, without any notice to your orator or to his att'y, or to any other party defendant, & your orator is advised, & so charges & contends that before the said circuit court could rightfully have acquired jurisdiction in said cause to render any pretended final decree in said cause against your orator, he should have been notified of the transfer of said cause into said court, & have had a day in court; wherefore your orator is advised, & contends that the mode adopted in this case of transferring this cause from the district [court] to the circuit c't of the United States was altogether irregular & illegal, & that the jurisdiction of said court to render said final decree may well be doubted under the circumstances. And your orator further states that, on or about the 21st of February, 1867, there was rendered in said cause by the said circuit court another decree or order without any notice to your orator, and without any knowledge thereof on his part,
232 which is hereto exhibited, marked *Exhibit No. 8, as part hereof.

32nd. Your orator further represents to your honor, by way of showing the manifold irregularities & oppressive nature of the proceedings had against him in this cause, that one Russell Howard, not a party to the record at the time, made an affidavit in which he swore that he was a party, whereby he obtained, in the name of himself & other complainants, rules nisi against your orator & the other defendants, including several persons who were not parties defendant to said suit & decree to show cause why they should not be attached for failing in certain specified particulars in executing said pretended default decree, & did, by said affidavits, cause your orator to be arrested by attachment, & held in custody for several weeks, & has since, by means of said affidavits, caused writs of attachments to be issued against other persons, not parties defendant to said suit, although it appears from the supplemental bill of complainants themselves, exhibited here-
233 with, that said Russell Howard had parted with all his interest in the subject-matter of the said suit, & was, by the said complainants therein themselves, by his consent, dropped as a party long before the rendition of the said final decree, as will abundantly appear by reference to said supplemental bill, & said affidavits, & process on file in this cause, to which your orator craves leave to refer as often as necessary upon the trial hereof.

33d. Your orator further represents that his co-defendant John H. Herndon, having filed his petition for the purpose in the district court of the United States for the eastern district of Texas, at Galveston, was by said court adjudicated a bankrupt on or about the 31st day of December, A. D. 1868, and that one Branch T. Masterson was duly appointed by said court assignee in bankruptcy of the estate of John H. Herndon, and still is, & is acting as such, assignee of said estate; that the said complainants in said original bill have instituted, through the said Russell Howard, certain proceedings in said district court,
234 at Galveston, against said assignee, touching the estate of said John H. Herndon, which are still in litigation & still pending in said court, at Galveston, as your orator is informed & believes.

Your orator having applied to said Branch T. Masterson, through the agency of his solicitors in this cause, to join in this bill as co-complainants, the said Branch T. Masterson, as such assignee of the estate of said Herndon, a bankrupt, declined & refused to do so: Whereupon

* For decree, see page transcript.

your orator, in order to have all parties to said decree before the court, where its merits and validity are inquired into & determined, has been compelled to make said Branch T. Masterson, assignee as aforesaid, a party defendant hereto, as he has been advised was usual and customary, & in accordance with the practise in chancery under the circumstances.

Your orator states, in this connection, that the interest of said John H. Herndon, in said decree, & in the subject-matter or land intended to be covered & embraced by it, is not a joint interest with that of your orator, but wholly separate & distinct, as will appear from the bill & exhibits of said complainants themselves, said bill claiming,
235 and said decree by default confirming, complainants' title to the said large Spanish grant to the San José Mission Indians, heretofore set up & described, of about twenty-one & half leagues of land, as described in said bill & decree; & defendant Herndon claims & holds certain parts of said land, which he located as part of the vacant public domain of Texas, & which the State of Texas sold & conveyed, by patent & otherwise, to him, the said John H. Herndon; & your orator holds & claims certain other parts of said land located by him, & by him also purchased from the State of Texas, for which he holds the evidence of title hereinbefore set forth; so that, in fact, said Herndon & your orator hold & claim separate & different tracts of land by separate & distinct purchases, & titles in no manner or degree connected, joint or common.

34. Your orator further states, by way of showing the fraudulent & unfair manner by which the said suit in chancery has been conducted against him, in which the decree complained of was obtained, & about the pretended execution of which he has since been so much & so unjustly harrassed & oppressed, that, on or about the 2nd day of
236 July, A. D. 1867, William Alexander, complainants' solicitor, fraudulently wrote, signed, & filed with the clerk of this court a declaration to the effect that his connection with said suit, as solicitor for complainants, terminated before that time, & no longer existed; and yet your orator charges the fact to be, that he has before, & ever since said date, continued to act as such solicitor, inaugurated & prosecuted the vexatious & oppressive proceedings for rules nisi, and attachments, motions, &c., hereinbefore mentioned & complained of, this written declaration still remaining on file, unrevoked or cancelled, to mislead & deceive the court & your orator, & in manifest contempt of the court, & disregard of the right of your orator, & of those principles of fairness & honesty which should characterize the conduct of solicitors & counsellors of this honorable court in the conduct of their suits.

35th. To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, & may, upon their several & respective corporal oaths, & according to the best & utmost of their several & respective knowledge, remembrance, information, & belief, full, true, direct, & perfect answer make to each of the several interrogatories hereinafter numbered & set
237 forth, as by the note hereunto written they are respectively required to answer, that is to say:

1st. Whether it is not true that the pretended conveyance of the land in controversey by John McMullen to Bainbridge Howard, of Louisianna, dated November 5th, 1849, was not made with the purpose & design of obtaining thereby jurisdiction in the U. States courts to retry said cause, & whether the pretended conveyance was not made

at the suggestion of Volney E. Howard, & the fraudulent purpose thereof well known & understood by the said Bainbridge Howard at the time said conveyance was made, & whether said conveyance to said Bainbridge Howard, was not made without any full & valuable consideration; & if not, what consideration was paid to said McMullen by the said Bainbridge Howard?

2nd. If the said pretended conveyance of November 5th, 1849, was not made for the purpose of allowing suit to be instituted in the Federal courts after a full & fair trial before a court of the State of Texas, state for what purpose the said conveyance was made to the said Bainbridge Howard, the brother of McMullen's att'y, & what was the consideration paid by said Bainbridge Howard, if any was
238 in fact paid; when, where, & how the same was paid, and in whose presence was the same paid.

3d. Whether the statement in complainant's said bill, that they were, at the time of filing the same in the said United States court at Galveston, in the actual possession of said land, & held the title in fee to the same, was not untrue in point of fact. If not, state what part of the said land was possessed at that time by any of the complainants, & which one; or, if such possession was held by tenant or agent, state the name of such agent or tenant, and where he now resides.

4th. Whether the allegations in this bill, are not true, that divers persons were named as parties defendant to the bill filed by the said Bainbridge Howard, who were known to have no interest in the case of any kind, merely for the purpose of obtaining jurisdiction in a court of equity, as distinguished from a court of law, on the false pretence of avoiding a multiplicity of suits. If such was not the purpose of making those persons, mentioned in this bill as such, parties to said bill, why were they made parties & afterwards dismissed without any attempt to obtain a decree against them?

5th. Was not the expedient of the pretended sale by McMullen to his attorney's brother, living in another State, to give color of
239 jurisdiction to the courts of the United States, after the final decision of the case in the State courts, & was not the making of numerous parties to said suit who were known to have no sort of interest in the same, also an expedient resorted to to give color to the pretence of resorting to a court of equity to avoid a multipilicity of suits? If not, for what purpose was the pretended sale & transfer made by McMullen to Bainbridge Howard, the brother of McMullin's att'y, & for what purpose were the persons, known to have no interest in the cause, made parties defendant? State fully.

6th. Is it not true, as stated in this bill, that, in January or Feb'ry, 1861, complainants, by their solicitor, William Alexander, in a conversation with your orator on the subject of the suit then pending in said court, for the land or title in controversy, promised & assured your orator that no further steps or proceedings would be taken in said cause, until the said Alexander, as such solicitor of the said complainants in said suit, should again see your orator & confer with him on the subject of said suit; & is it not true, as stated in this bill, that said Alexander did not again see or confer with your orator on
240 the subject, but on the contrary, without giving your orator any notice, proceeded to take a final decree by default in said cause? State fully.

7th. Is it not true that, when the said W'm Alexander procured from your orator, the written argument of the 20th of June, 1860, marked Exhibit No. 4, that he failed to inform your orator, & utterly concealed

from him the fact that there was an existing written agreement of a different purport in relation to the conduct of said cause between W'm Alexander, as solicitor for complainants in said cause, & the said E. M. Pease, esq., as solicitor for your orator, & that he did not thereafter inform your orator of that fact?

36th. Your orator prays that the execution of said decree here complained of, be stayed & enjoined until a final hearing of this cause, & that defendants be enjoined, by order of this court or by writ of injunction, as to your honor may seem meet, from proceeding to take possession of said land to sell the same or any part thereof pending this litigation, & that at the final hearing of this cause the said decree be reversed & annulled or recalled, & the said bill dismissed as not properly cognizable in a court of equity upon its appearing that the allegations in
241 the same, upon the pretence of which equitable jurisdiction was based & sought by said bill, were & are entirely false & colorable; & also, on the ground that the circuit court of the U. S. has and had no jurisdiction of the real parties in interest, upon its appearing that the pretended sale, set forth herein to said Bainbridge Howard, of Louisiana, was merely colorable, fraudulent, & fictitious, & was only resorted to as a means of ousting the State courts of Texas of jurisdiction of said cause, at the election of said complainants in said bill. And your orator further prays, in the alternative, that if, at the hearing of this cause, it shall appear to the court, that it has, as a court of the United States, jurisdiction & power to decide said cause, then & in that case, your orator prays that said default decree be reversed, annulled, & set aside as not warranted by the allegations in the bill upon which it was obtained & passed, the same having been taken pro confesso; & there being no other proof or evidence, in support of said decree, &, also, on the distinct ground that said decree was obtained by the fraud of the complainants thereto, through their solicitor, William Alexander, & that said bill be dismissed with costs; or, in the alternative, if it shall appear to be the better course of practice that said de-
242 cree be opened & set aside & by order of your honor's court, your orator permitted to plead, answer, or demurrer to & defend against said bill, as he may be advised is proper, that the cause may be decided & finally determined upon its real merits, according to equity & justice, under the laws of the land; & that his title-papers, now on deposit in this court, be returned to him, & he recover the costs unjustly sustained & paid by your orator in this behalf in consequence of the frauds practised upon him aforesaid; and that your orator shall have, generally, such other & further relief as the nature of the case may require.

37th. Therefore, will your honors grant unto your orator the writ of subpœna issuing out of & under the seal of this court, to be directed to said defendants Volney E. Howard, who resides in the State of California; Russell Howard, who resides in Bexar County, Texas; Thomas H. Bennett & his wife, Caroline H. Bennett, (formerly Caroline Howard,) Ephraim H. Lombard & his wife, Julia A. Lombard, (formerly Julia A. Howard,) & Mehitabel Howard, who reside in the State of Illinois; & John McMullen, Anthony McMullen, James McMullen, Neal Mc-
243 Mullen, Ann McMullen, Morris Egan & his wife, Margaret Egan, (formerly Margaret McMullen,) who reside in the State of Pennsylvania; & Branch T. Masterson, assignee in bankruptcy of John H. Herndon, who resides in Galveston County, Texas, commanding them & each of them, by a certain day & under a certain penalty therein inserted, to appear before your honor, in the circuit court of the United

States for the western district of Texas, at Austin, in the State of Texas, & then & there answer the premises & abide the order & decree of the court; & your orator also prays that if such of said defendants mentioned & named above as residing beyond the jurisdiction of this court, to wit: Volney E. Howard, who is a citizen of & resides in the State of California; Thomas H. Bennett & his wife, Caroline H. Bennett, Ephraim H. Lombard & his wife, Julia A. Lombard, & Mehitabel Howard, who are citizens of & reside in the State of Illinois; & John McMullen, Anthony McMullen, Neal McMullen, Ann McMullen, Morris Egan & his wife Margaret, who are citizen' of & reside in the State of Pennsylvania; & Russell Howard, who is a citizen of Texas, shall fail to come within the jurisdiction of this court, so that
244 process may be served upon them, & submit to the jurisdiction of this honorable court, in the premises, then & in that case your orator prays that service of said process upon their solicitor & counsel, W'm Alexander, who resides in Travis Co., Texas, be had and substituted for service on said defendants, so far & only for the purpose of resisting, if they can, the application of your orator for the stay & injunction of said decree until the said non-resident defendants do appear and submit to the jurisdiction of this court in this case.

HANCOCK & WEST,
LONG & PRICE,
Complainant's Sol'c't'rs.

NOTE.—The defendant Volney E. Howard alone is required to answer the above-mentioned interrogatories from No. 1 to No. 7, inclusive.

STATE OF TEXAS, *Travis County:*

Personally appeared before the undersigned authority, Samuel A. Maverick, the complainant in the foregoing bill of complaint, & being by me duly sworn, on oath says that the matters and things in said bill set forth are, where stated of his own knowledge, true; &, where stated as upon information, he believes them to be true.

S. A. MAVERICK.

Sworn to & subscribed before me this 3d of Jan'y, 1870.

WESTERN ROWAND,
U. S. Comm'r.

245 And afterwards, to wit, on the 7th day of January, A. D. 1870, the following entry appears upon the rule or order book, to wit:

Entry rule-book of filing of papers of complainant.—Entered Jan'y 7, 1870.

B. D. HOWARD'S HEIRS *vs.* A. HODGE ET ALS. } No. 10. Chancery.

AUSTIN, TEXAS, *January* 7, 1870.

Now comes the solicitor of complainants and files the following papers:

1. Affidavit of W'm Alexander.
2. Affidavit of Russell Howard.
3. Affidavit of Charles de Montel.
4. Agreement of Alexander releasing fee.
5. Exhibits to affidavit Alexander.

M. HOPKINS, *Clerk.*

And which said papers are in words to wit:

246 *Affidavit of W'm Alexander.—Filed Jan'ry 7, 1870.*

Affidavit of W'm Alexander. Filed January 7th, 1870.
M. HOPKINS, *Clerk.*

In the circuit court of the United States for the western district of Texas, at Austin.

BETWEEN THE HEIRS OF BAINBRIDGE HOWARD, dec'd; that is to say, Russell Howard and others named in the record, complainants,
and
ARCHIBALD HODGE & OTHERS; THAT IS TO say, Samuel A. Maverick and others named in the record, defendants.
} In chancery. Number ten.

William Alexander, a practising attorney and counsellor at law and solicitor in equity of this court, residing in Austin, maketh oath and saith that he has relinquished absolutely and in the most ample manner all claim for compensation or fee for attending to the above-entitled and numbered suit, so far as the locations made upon the John McMullen tract and claimed by the def't Samuel A. Maverick are concerned, and that he now has no pecuniary interest, direct or indirect, present or remote in the same, as will appear by reference to an agreement herewith filed and referred to as a part hereof.

Deponent further saith, that he is informed by the record of the supreme court of the State of Texas, and that he verily believes,
247 that the suit in said court of John McMullen vs. Archibald Hodge et al., the same being No. 541 on the docket of said court, which was brought for one labor located upon the John McMullen tract, was affirmed by said supreme court on the twenty second day of February, A. D. 1850, and that this suit was brought within one year thereafter, as will appear by reference to the file-mark on the original bill therein.

Deponent further saith that within the last year one Nicholas Hoffman, who claimed title to the one hundred acres of the said Archibald Hodge labor, did voluntarily convey the same unto the complainant Russell Howard, or to him and his co-complainants in this suit, the said one hundred acres of said labor, which fact deponent knows, he having drawn up the conveyance for said Hoffman, and seen the same duly executed and delivered.

Deponent further saith that said Hoffman then stated that he had, some month' before, abandoned his possession of said portion of said Hodge labor, and that he admitted said Russell Howard then to be in actual possession thereof, said Howard being then personally upon said John McMullen tract.

Deponent further saith that, about the same time, he heard the occupant of the remaining portion of said Hodge labor state that he would bring in his title-papers in a day or two, and make a compromise
248 with said Howard for the same, but that, as he left Castroville soon after, he has not been informed w'ether such compromise was completed.

Deponent further saith that he did not commence this suit, but was employed as solicitor and counsel therein after it had been removed from Galveston to Austin; that, in that capacity, he has examined the title of what is now called the John McMullen tract, which was petitioned for by Domingo Castello, on the ninth day of February, A. D.

seventeen hundred and sixty-four, and the title to which appears to have been granted to the Indians of the Mission of San Joseph or San José, as purchasers at a public auction on the eight' day of November, A. D. seventeen hundred sixty-six, under which title he is informed and believes, continuous and adverse possession of said tract has been held ever since, and is now held, by said Russell Howard.

Deponent further saith that he has particularly examined the testimonio por concuerda of the original grant to said Indians, under whom the complainants claim, which is bound up in volume fifty of the archives in the Spanish language, in the general land office of the State of Texas, and that he found that said grant conveyed full dominion to said Indians as the highest bidders at an auction sale of said tract, coupled with the condition of inalienability, which condition he is informed and
249 verily believes, if ever valid in case of a public auction sale of title, has since been abrogated and done away with by the repeated changes of government, which are matters of public and general history, that subsequently occurred, thus leaving the title extended to said Indians, through whom complainants claim to deraign title and hold actual possession on a footing equivalent to a fee-simple title at common law.

Deponent further saith that he files herewith as a part hereof a translation of said testimonio which he has not compared throughout, but which he believes to be substantially correct, and refers to the same in corroboration of what he has hereinbefore stated.

Deponent further states that he is informed and verily believes that said Maverick and said Herndon had notice of said title before they made their locations upon said tract, he knowing that said title is platted upon the first, or H. L. Upsher map, of Bexar County; that said testimonio is not only on file in the general land office, but is marked as follows, as being "duly registered in the county clerk's office of said [Bexar] County, in record-book E, pages 220 to 257, inclusive," on the twenty-sixth day of September, A. D. 1838.

Deponent further saith that he appends hereto and refers to the same as a part hereof a written statement, signed by the commissioner of the general land office of the State of Texas, and that he is
250 informed and verily believes that the contents of said statement are true.

Deponent further saith that, for sometime after he had been employed as aforesaid in this suit, he was unable to proceed with the same, because he was not furnished with the instrument of writing made by said McMullen to said B. D. Howard, said instrument not being recorded, and having been intended to convey said tract, and that when with much delay and great difficulty he obtained said instrument, he found to his surprise that it was not a deed; that, though notarially acknowledged and certified, it was only signed by said McMullen, without any seal, or scroll in lieu thereof, having been affixed to his signature, and was, besides, not attested by any subscribing witness or witnesses; in short, that, in his opinion, it amounted to an equitable title only, and not to a legal title.

Deponent further saith that it was not the intention, when this suit was brought, to make the heirs of said McMullen parties, but that they were made parties to this suit on his suggestion, and solely in consequence of his having discovered said instrument to contain the peculiarities stated.

Deponent further saith that he entered a decree pro confesso against defendants Maverick and Herndon, at September rules, A. D.

251 eighteen hundred and fifty-nine, and that, on returning to his room after having done so, he found that E. M. Pease, esq., had been there, and, as solicitor for said Maverick, had written him a note which he cannot now find, requesting, as a matter of courtesy, that time should be extended to him to prepare an answer for said Maverick.

Deponent further saith, that, afterwards, and as a matter of professional courtesy to said Pease, he agreed with him and not with said Maverick, that said pro confesso should be set aside as to said Maverick, without costs, and, that when ready to do so, he would notify said Pease that said suit was to be proceeded with.

Deponent further saith that this agreement was voluntary—was a matter of professional courtesy between himself and said Pease alone, and, to the best of his recollections, was verbal only, and not written.

Deponent further saith that it did not provide what should be done in case either he or said Pease should in the meanwhile leave the State, neither of them contemplating any absence from the State at that time, though both did afterwards go abroad.

Deponent further saith that, some time afterwards, but before a term of the United States court at this place had intervened, at which proceedings such as must be had at term time could be taken in this
252 suit, said Pease did leave this State, as deponent is informed and verily believes, and did not return to Austin for several months, and that, during his absence, a term of said court occurred, at which defendant Maverick was present in person, as well as deponent remembers, looking after a suit prosecuted against him in said court in behalf of Duffield's heirs, by Mess. Hancock & West, and others. Deponent further saith that, not feeling warranted to delay action in this suit on account of the unanticipated and continued absence of said Pease, and wishing to carry out his agreement with said Pease in spirit, though the absence of said Pease precluded it from being carried out to the letter, he fully informed said Maverick of said agreement, and that he would then carry it out by setting aside said pro confesso as to him without costs, and would proceed with the case, and, at the same time, informed the solicitors of defendant Herndon that it was his intention to proceed promptly with the prosecution of the suit. Deponent further saith that they thereupon stated that the answers of said defendants Maverick and Herndon were not prepared, and requested further time to answer.

Deponent further saith that he would not concede them any
253 further time than the rule-day allowed them by law, unless they would comply with such terms as he would dictate, and that they could only obtain his consent for their having further time beyond one rule-day by signing, and causing to be entered as an order of the court, made at their instance, an order which he would prepare and submit to them; that he did, thereupon, prepare and submit to them such order, which, after an interlineation, duly noted, had been made therein for the benefit of said Herndon, at the earnest request of the solicitors of said Herndon, was most willingly signed by the solicitors of said Herndon, and by said Maverick, and was, with a full understanding of it' import, entered, at the instance of the signers, deponent consenting, as an order of the court, on the twenty-fifth day of June, A. D. eighteen hundred and sixty.

Deponent further saith that he did not practice any artifice on, or mislead or deceive said Maverick, or the solicitors of said Herndon, touching said order, or in regard to any other matter in the progress of this suit, and that he was aware that nothing of the sort could be of possible benefit or advantage to complainants, all of whom except two were

residents of other States more or less remote from Texas, and none of whom were kept fully informed of the progress of their suit.

254 Deponent further saith that, afterwards, during the same term, in pursuance with said order, another order was prepared by him, and was, as is usual in such cases, submitted to the solicitors of said Herndon, but not to said Maverick, because he did not happen to be in court at the time, and had not employed any solicitor to represent him in the absence of said Pease, providing "that complainants have leave now to file in open court their supplemental bill, as is stipulated in the aggreement filed therein at this term." Whereupon Geo. W. Paschal, esq., first wrote upon it in pencil "O. K. Paschal;" but, upon objection *bade* made to such a slang assent, and in pencil by the solicitor for complainants, wrote with pen and ink upon it "Let it be entered. Paschal;" thereby signifying his assent thereto; and thereupon said order was granted, signed by the judge, and filed on the twenty-ninth day of June, A. D. eighteen hundred and sixty, and is hereby referred to for the full contents thereof.

Deponent further saith that he filed his supplemental bill, as was stipulated, and, afterwards, on the fourth day of July, following, set out for Mexico, and was on the road going and coming, and was at various points in Northeastern Mexico during a revolution which greatly interrupted all communications until after the rule-day in September in that year, but that, while at Saltillo, on the thirtieth day of July, he

255 received a letter from this brother, at Austin, dated on the fourteenth of that month, in which, among other items of general news, it was stated, and he verily that it was true "Gov. Pease has returned."

Deponent further saith that, after having refreshed his memory, by referring to contemporaneous entries made in his diary, to said letter, and to copies of records of the district court for Falls County, he is able to state positively and with precision that, after returning from Mexico, he left Austin on the sixteenth day of September, A. D. eighteen hundred and sixty, for the Falls County district court, and there remained, and was engaged in the defence of the Lapsley cases therein, as will appear by reference to law record No. 1108 in this court, and did not return to Austin until on the eleventh day of the next month. Deponent further saith that, during his absence from Austin as aforesaid, and without his knowledge, Richard A. Howard, since deceased, one of the complainants, as he is informed and verily believes, while passing through Austin in going to or coming from Fort Mason, ascertained the condition of this suit, and thereupon authorized and instructed Robert A. Alexander to enter a pro confesso therein on October rule-day as solicitor pro hac vice for complainants, which *is* deponent has since ascertained from the record was accordingly done. Deponent further

256 saith that, after his return from Falls County, though he cannot recollect precisely the date, said Pease informed him that he was no longer the solicitor for said Maverick, and, though he made no complaint of deponent, and did not pretend that deponent had not done what, under the circumstances, he was bound to have done, gave deponent to understand that said Maverick had not furnished him with the materials necessary to enable him to prepare an answer, specifying, among other material, a copy of the statement of facts in the case of McMullen vs. Hodge, in consequence of which, though he had made notes towards that end, he had not prepared an answer, and expressing his belief that said Maverick expected him to work in this and in the Duffield case or cases in this court without paying him any fee, or any adequate fee.

Deponent further saith that said Pease informed him that he had notified said Maverick, though he did not say how, that he would not longer act as his solicitor and counsel in this suit, and he verily believes that he did so, and that said Maverick, though aware of the fact, did not prepare any answer or employ any other solicitor prior to the final decree in this suit, nor, indeed, as the record shows, for a consid-
257 erable time thereafter.

Deponent further saith that he was thereafter informed from various sources, and that he verily believes, that said Maverick did abandon the defence of this suit because, being largely interested in old grants, he could not afford to shake confidence in them by attacking so old a grant as that involved in this suit, earlier locations upon which had been lifted, because Cornelius Van Ness, esq., and Volney E. Howard, esq., had an investigation given their opinions that the condition of inalienability had been abrogated as aforesaid, and that the McMullen title was a good title.

Deponent further saith that he is informed, and verily believes, that said Maverick did continue of the intention not to make any further defence to said suit until after the inception of the rebellion, when he conceived the hope of being able to get rid of the pro confesso which he knew had been entered against him by means of the destruction of this court.

Deponent further saith that, as the record shows, said Maverick did not, after the withdrawal of said Pease, make any further defence to this suit prior to the rebellion; he recollects distinctly, and states positively, that, in the fall or early part of the winter of A. D. eighteen
258 hundred and sixty-one, said Maverick, also then a member of the legislature, did stop deponent, after dark, on Congress avenue, in Austin, and with him the conversation which is set forth in the affidavit of Russell Howard, esq., in this suit.

Deponent further saith that said conversation is correctly stated in the affidavit of said Howard; that it was strongly impressed upon his memory because of the time when it occurred, and because said Maverick brought it about, and because he knows that he never heard of the "act for the removal of suits from the late district courts of the United States" from any other person.

Deponent further states that, soon after said conversation, he left Texas, and was absent for about four years; that, after his return, recollecting distinctly what said Maverick had stated concerning said act, and in connection with this suit, he hunted up said act, (chapter xxviii, approved January 23, 1862,) and read it for the first time, and examined the record of this suit to see whether any action had been taken with reference to it in this suit in his absence, and found that none
259 had been taken, because, as he has been informed and verily believes, Judge Divine, who was judge of the Confederate States court, and who, as deponent is informed and verily believes, is now of counsel in this suit for said Maverick, was interested in said McMullen tract.

Deponent further says that he also sought to examine the journals of the legislature that passed said act, to ascertain who was particularly instrumental in procuring its passage, and inquired for them at the State Department and was then informed and verily believes it to be true that they have been abstracted by some person or persons unknown, supposed to be interested in concealing their contents, and cannot now be found.

Deponent further saith that, without thereby by implication admit-

ting the rest of the statements contained in the third or amended paper writing, filed as an affidavit in this suit by said Maverick, on the fourth day of October, A. D. eighteen hundred and sixty-nine, which, as made, are incorrect and not in accordance with the facts, no such conversation as is alleged therein to have occurred between said Maverick and deponent ever in fact occurred at the time and place recited, or at any other time and place whatever; deponent meaning and intending to distinctly state that said Maverick never complained to him of said pro confesso, which the record shows was not entered by deponent but
260 by another solicitor as aforesaid, nor of any other order in this suit; that deponent did not thereupon seemed touched by an appeal made to him, concerning an order so entered, and, as he verily believes rightfully, during his absence at Falls County, or any other order, and that he did not say "I will do nothing further in this case until I see you again," or words to that effect; deponent meaning distinctly to say, that he never at any time in the progress of this suit made any verbal or other agreement with said Maverick, to give him any notice whatever, and that he had no authority from complainants so to do. Deponent further saith, that he has been informed by the papers and records of this suit, that said Maverick was served with the subpœna therein on the eighteenth day of November, A. D. eighteen hundred and fifty-one; that he was served with a subpœna to revive on the seventh day of May, A. D. eighteen hundred and fifty-nine; that he, together with the solicitors of his co-defendant Herndon, signed a voluntary agreement whereby they obtained an extension of time in this suit on the twentieth day of June, A. D. eighteen hundred and sixty, and that in addition to the constructive notices which the record shows he received, he had further actual notice of the execution for costs, the rule nisi and the attachment against him, and yet that upon each of these various
261 and successive notices actual and constructive, he did not embrace the first opportunity thereafter to do what equity required him to do, and has failed to make any showing by way of excuse for each of his successive neglects; deponent meaning distinctly to say that he is informed by the record of this suit and verily believes that said Maverick has never used ordinary diligence in making defence to this suit during the successive steps of its progress, of which he had notice, by moving to set aside orders of which he made no complaint until after a final decree, and that even after such decree he failed to apply for a rehearing in accordance with rule eighty-eight governing the practice on the equity side of this court, and then refused to join his co-defendant Herndon in the prosecution of an appeal.

Deponent further saith that said Maverick is, according to public and general reputation, a lawyer by profession, though he is not reputed to have continued in the practice of his profession, an extensive land speculator, and a man of large wealth, and that he is informed by the record of this suit and verily believes, and besides has personal knowledge that it is a fact that, for years after said Pease had notified him as
262 aforesaid, and indeed until recently, did not, either in person or by solicitor or counsel, make any defence therein, and has not ventured to state of record that he ever at any time prepared and made oath to any answer.

Deponent further saith that he is informed and verily believes that, although said Maverick shows that when he prepared his first paper-writing filed as an affidavit he then thought of a bill of review, he did not then prepare and make oath to such bill but drew up said first paper-writing himself and sent it direct by mail to the judge of this court, and

did not have counsel in court to represent him upon it nor did he then appear in court in person.

Deponent further saith that he is informed and verily believes that the final decree and subsequent orders obtained by complainants in furtherance thereof after the term of which they were enrolled could not be collaterally modified or altered but have remained and are unreversed, unsatisfied, and in full force and can now only be enforced by this court.

Deponent further saith that he is informed and verily believes that said Maverick has not in all things obeyed the same, in that he has not caused his locations and patents on the John McMullen tract to be cancelled and removed, but has suffered the same to remain as a cloud
263 upon the title of the complainants, and has thereby committed and is persisting in a contempt of this court which is made the more apparent by his profession or readiness to obey any future order of this court, thereby expressing by implication his determination not to in all things obey said final decree. And further deponent saith not.

The words "half" crossed out and the words "hundred acres" interlined, the words "half" crossed out and the words "one hundred acres" interlined, the words "half" crossed out twice and the word "portion" interlined in each instance; and the words "by means of the service" crossed out hereinbefore, before signing.

WILLIAM ALEXANDER.

Sworn to & subscribed this 3d Jan'y, 1870, before me.

M. HOPKINS, *Clerk.*

264 GENERAL LAND OFFICE,
Austin, Nov. 2nd, 1869.

Hon. W'M ALEXANDER, *Austin.*

DEAR SIR: In answer to your letter of the 21 ult'o, I beg leave to make the following statement:

The map of H. L. Upshur, of Bexar County, was made in the year 1845. The nearest point of the Jno. McMullen tract to the Mission of San José is 14½ miles. The certificates under which survey No. 41, Steele & Colquhoun, ass'ees of Nicholas Navarro; No. 42, the same, ass'ees of M. Losa; No. 43, the same, ass'ees of G. Del Tora; and No. 65, A. Jones, administrator of J. Jones, were withdrawn from the district surveyor's office on account of conflict with the McMullen grant. The old map of Bexar County shows these surveys, but the field-notes were never returned to this office. The following certificate from the district surveyor, *or* of Bexar County, shows when these surveys were abandoned:

"I, I. S. McDonald, district surveyor for Bexar district, do hereby certify that the certificates under which surveys Nos. 41, 42, 43, and 65, on the Medina and waters, were made, were withdrawn in
265 *in* consequence of conflicting with the McMullen grant, as appears from the records of my office.

"I. S. McDONALD,
"*District Surveyor, Bexar Dist.*

"SAN ANTONIO, *Sept. 9th,* 1850."

(See file 833, Bexar, 1st class.)

The Nicholas Navarro claim is now located in Wood County, and has been patented, and the original locations on the McMullen grant by S.

A. Maverick, ass'g'ee of Gasper Flores, M. Tora, and Gaudelupe del Turo, also lie in Wood County, and have been patented—and the original locations are both now covered by a claim in the name of the heirs of Jane E. Calder. Ira Jones, dec'd, by adm'r Amon Jones, is located and patented in Zavalla County, and the original location is also covered by Jane E. Calder's claim. Samuel A. Maverick has not returned to this office any of the patents owned by him for cancellation under the decrees of the U. S. district court, nor has he sought to abandon any of his unpatented claims lying on the said McMullen grant. There is nothing in this office to show when the copy of title to the Indians to the Mission of San José was filed.

Yours, very respectfully,

JOSEPH SPENCER,
Com'r Gen'l Land Office.

266 *Affidavit of Russell Howard.—Filed Jan'y 7, 1870.*

Affidavit of Russell Howard. Filed January 7th, 1870.
M. HOPKINS, *Clerk.*

In the U. S. circuit court for the western district of Texas, at Austin.

THE HEIRS OF B. D. HOWARD
vs.
ARCHIBALD HODGE ET ALS., I. E., JOHN H. Herndon and Samuel A. Maverick.

RUSSELL HOWARD, who is hereinafter styled affiant, on behalf of complainants, being duly sworn, on oath says that he is advised and alleges that the defendants John H. Herndon and Samuel A. Maverick are still in contempt of this honorable court, as well by the final decree against them of January 20th, 1866, as for that they have not in all things obeyed said final decree and the orders subsequent thereto. Said decree provides that, "It is further ordered and decreed that all patents, locations, and surveys obtained or owned by said defendants Maverick and Herndon that are in conflict with the title of complainant, which is decreed to be a good title, are, and are hereby adjudicated to be, null and void, and that said defendants shall cancel and remove the same." Affiant alleges that said patents, locations, and surveys,
267 have not been cancelled, as he is informed and believes, as was required by said decree to be done. Affiant is informed and believes that, upon the rule nisi in this case made, it was ordered by this honorable court, on the 8th day of October, A. D. 1869, in regard to the patent, locations, and surveys of def't S. A. Maverick, conflicting with complainant's claim, as follows: If, therefore, the said Maverick has the patents so conflicting in his possession now, and on or before to-morrow morning at 10 o'clock a. m. he deposits the same with the clerk of this court, subject to the disposition of the court, or if he has not the said patents now with him, will cause the same to be deposited in ten days from this time, then, in either event, and on the further condition that he pay all costs accruing against him, the attachment under which he is held is hereby dissolved; otherwise he must be held in custody, and it is so ordered accordingly.

Affiant is advised, and therefore most respectfully suggests and states, that this order of the hon'l court, in so far as it appears to change, alter,

or modify the decree aforesaid, is of no force or validity, and he
268 prays respectfully that it may be corrected.

Affiant is advised and believes, and therefore so states the fact to be, that this order is not the same to complainants as affiant thinks, nor does it afford them the complete remedy afforded by said decree. For, although the said decree cancels and annulls the said patents, locations, and surveys, still, the same being on the records of the general land office and the district surveyor's office where the land lies, and on their maps, & in many cases appearing registered in the county clerk's offices, has the appearance of conflicting with complainant's grant, & injures the sale and value of their land and appears to be a cloud upon their title, the very thing to remove which the complainants originally sued.

Affiant further says that he is informed by the record, and believes, that even this last order has not been obeyed by said Maverick nor complied with. Said order recites: "But he" (Maverick) "offers to do now what the court may direct; and tho's he has heretofore failed to obey the decree requiring him to cancel his patents conflicting with the lands adjudged to complainants, he now prof'ers his readiness to deliver
269 them to the court for this purpose.

Affiant states that he is informed and believes that said patents, &c., have not been cancelled by the clerk of this hon'l court, or by any other person, although more than a reasonable time has elapsed since said decree and order was made; nor does it seem to affiant that said Maverick placed them in the hands of said clerk, with power to cancel the same; on the contrary, affiant is informed and believes that they were sent directly to his honor, the judge, with an unsworn paper, stating, among other things, this: "All of which are put by me at the future disposition of said hon'l circuit court, in the case No. 10, in ch'y," &c. Affiant further says that the locations and surveys of said S. A. Maverick, as he is informed and believes, are not filed at all by him; but he states, in said paper, of date Oct. 13th, 1869, which is made part hereof for ref'rence, that they are in the general land office. Further, by said paper, not sworn to, the said def't Maverick places his patents at the future disposition of this hon'l court, and not of his honor the judge now presiding, or the cl'k of said hon'l court, thereby, as affiant believes, designedly attempting to evade
270 and disobey said order as well as said decree.

Affiant says that he is informed by the record and papers in the cause, and believes, that the subpœna on the original bill in the same was served on said Maverick on the 18th day of Nov., 1851. That the subpœna in the bill of revivor was served on him on the 4th of May, 1859; that, by the agreement of the 20th of June, 1860, made part hereof, and signed by said Maverick and J. A. and G. W. Paschall, for said Herndon, all further process was waived by said Maverick; that the pretended conversation had between said Maverick and W'm Alexander, esq., shows he had notice of the decree pro confesso, pending against him at the time. Ref'rence is made to the third affidavit of said Maverick as to his assertions in regard to the same. Affiant further says that, having the execution for costs in chancery suit No. 10 in his hands and control, about the 27th day of July, 1867, he called at the house of said Maverick, and handed him the same, which he read, and asked for a little time to say. On the 29th day of said month he (said Maverick) came to affiant's office, in San Antonio, Texas, with J. A. Pas-
271 chall, now deceased, and they examined the same carefully to see if the costs were properly taxed; and defendant Maverick then

paid his half of said costs, as appears of record on said execution. Affiant further says that he is informed by the record, and believes that, under rule—4th rule—said Maverick had constructive notice of proceedings in said cause by entries on the rule-book, (so called,) on July 1st, 1859, August 1st, 1859, Sept. 5th, 1859, October 1st, 1859, Nov. 5th, 1860, August 15th, 1860, March 1st, 1861, & March 4th, 1861. This affiant admits that, on the 14th day of April, 1859, he and Richard A. Howard, now deceased, transferred to V. E. Howard their interest as heirs of B. D. Howard, deceased, in & to the lands adjudicated to complainants herein; but affiant says that he is informed and believes said deed was mislaid, and was never presented to the hon'l court or the master in chancery, on the rendition of said final decree. Affiant is informed by the record, and believes that he was one of the complainants in the original bill of revivor, as well as said R. A. Howard, dec'd, which was filed January 29th, 1859, & that they were both named
272 as complainants in said final decree. Affiant never knew, until he saw the affidavits of said Maverick, that he was not a complainant also in the supplemental bill of revivor, filed June 29th, 1860. Affiant is advised that he is still a complainant in this cause; and he further states that he is the attorney-in-fact of Volney E. Howard, by a power of attorney, coupled with an interest.

Affiant further says that, long since, William Alexander, esq'r., notified this affiant by letter—which is now in San Antonio, Texas—that he (said Alexander) had done all his contract required in the case, and that he had ceased to be the solicitor of complainants therein. This was about the month of July, 1867, to the best of affiant's recollection. When this affiant sought to have the said final decree enforced, he applied to said Alexander and, procured his assistance for this purpose only. And this affiant says that he is well convinced that said Alexander has never received any compensation for his services heretofore rendered in the prosecution of this cause as to said Maverick's interest claimed. Affiant is informed and believes that the relations
273 between said Alexander and said S. A. Maverick were never specially cordial or friendly, being mostly what is called a "street acquaintance." Affiant further says that he is informed and believes that, from the date of the grant to the native Indians of the Mission of San José, in 1766, they, said grantees, had exclusive and uninterrupted possession of said lands, (since adjudicated to complainants in said final decree,) claiming the same as owners, and having pens thereon for their stock, and pasturing the same thereon in custody of their shepheards, up to the time that the same was sold to Refuyn de la Garza, about the year 1833, and that said de la Garza pastured his flocks thereon in like undisturbed possession until he sold to John McMullen about the year 1834, and that said McMullen had also possession of the same in like manner.

Affiant further says that he is informed and believes that, in the year 1844, said John McMullen, now deceased, took possession of said grant, through his tenants or those holding under him, & who erected houses and made improvements thereon, and held the same under said McMullen, who claimed the same as owner in fee up to the time said
274 McMullen sold to B. D. Howard, now deceased, and are still holding under the heirs of said Howard, claiming as owners in fee. And said land is now in the possession of said heirs by their tenants.

Affiant further says that, as to the Hodge labor in controversy, in the suit of McMullen vs. Hodge, in the State courts of Texas, set up by

the affidavits of said Maverick, one hundred acres have been conveyed by those claiming under said John H. Herndon to these complainants, and the other seventy-seven acres are agreed to be conveyed to them, and the patent cancelled; and further he says, that the suit of these complainants was filed within one year from the date of said supposed judgement of the supreme court of Texas. Affiant is advised, and says that he believes that the title above referred to to said land known as the McMullen grant, is a good title, as in said final decree expressed; he is further advised and believes, that the case in 5th Texas Reports, McMullen vs. Hodge et als., constitutes no bar to complainants, and is no guide to this hon'l court; the case of Trevinio vs. Fernandez, (13 Texas Reports, 630,) showing that it was rendered in mistake of law and fact.

And if it were not so, affiant is advised and believes that it is not
274½ obligatory on this honorable court in this case, and ought not to be considered so. Affiant further says that he, as the agent and attorney-in-fact of the heirs of B. D. Howard, deceased, has settled with all the settlers upon the land claimed by said Maverick, and conflicting with the land adjudicated to said complainants, as he has reason to know and verily believes; and with all such so claiming under said Herndon, except some six or seven, with which exception all are claiming under title derived from said complainants. And in no case has the improvements of said settlers been taken into account in said settlements, nor in any case has the same been taken from them.

Affiant further says that he is informed from the record and papers in this case, and believes that said defendant Maverick has not only not in all things obeyed said final decree and subsequent orders, but has filed in this hon'l court a paper-writing styled a petition, purporting be an application for leave to file a bill to stay and enjoin execution of decree & to recall and annull the same, and for other purposes; and has exhibited in this hon'l court another paper-writing for said purpose, in the body of which said second paper-writing he assumes to make one Branch T. Masterson, assignee of said John H. Herndon, a bankrupt, defendant; and, as this affiant is informed and believes, because
275 that, on account of said order procured by J. A. & G. W. Paschal for said Herndon above referred to, as well as on account of said agreement between W'm Alexander, esq., and said Paschal, and said Maverick above referred to, and on account of the records in said cause, the said Branch T. Masterson could by no means make oath to the matters and things which said Maverick has seen fit to set up in his said affidavit, application, & exhibit, but as defendant, said Masterson might make admission that said defendant Maverick may deem of service to h m.

Affiant further says that he is informed, from the public record and archives of this State, and believes that all of the defendants in the original and supplemental bills in this cause, chancery suit No. 10, did assert an interest in the subject-matter of said suit at the date of their respective filings, except two or three, who were made parties by mistake. Affiant further says that he is informed and believes that the sale by John McMullen, now deceased, to B. D. Howard, now deceased, referred to in def't Maverick's said second paper-writing, was not fraudulent as is alleged by said Maverick therein, but was a fair and bonafide sale.

Affiant further says that he is informed by the record in this
276 hon'l court in cause No. 183, Duffield vs. Maverick, and verily believes that said Maverick was personally in court on the 21st day of February, 1868, and made an affidavit in said cause.

NOTICE.—The words "that," on the 1st page, "Hood" on 3d page "bil" and "rule," on the fourth page of this affidavit interlined before signing.

RUSSELL HOWARD.

Sworn to and subscribed this 6th day of October, A. D. 1870.

M. HOPKINS, *Clerk.*

MOORE & SHELLY.

277 *Affidavit of Charles de Montel.—Filed January 7, 1870.*

Affidavit of Charles de Montel. Filed January 7, 1870.

M. HOPKINS, *Clerk.*

United States circuit court, western district of Texas. In chancery at Austin.

HOWARDS' HEIRS *vs.* HODGE ET ALS. } In chancery, rules nisi.

Before me, the undersigned commissioner of the United States for the western district of Texas, personally appeared Charles de Montel, to me well known, who, being duly sworn, deposes and says that, more than a year ago, I had a conversation with S. A. Maverick, one of the defendants in the Bexar County district surveyor's office, in substance, as follows: I remanded to him, alluding to the decree in this case, we are beat, or some such remark; he replied, it appears so. I asked him if he intended to proceed any further; he said he would see Herndon, but it would cost more than the land was worth, and he did not think he should. Mr. Maverick appeared to be perfectly aware of the decree and its effect.

And further, deponent saith not.

I have settled with the complainants since the decree, for all
278 the interest I had upon the land adjudicated to them, a part of which was derived from S. A. Maverick.

CHARLES DE MONTEL.

Sworn to and subscribed before me this 14th day of October, A. D. 1869.

[L. S.] THOMAS M. PASCHAL,
U. S. Comms'r W. D. Tex.

279 *Agreement of W'm Alexander, relinquishing fees, &c.—Filed Janu'y 7, 1870.*

Agreement of Alexander relinquishing fee. Filed January 7th, 1870.

MATTHEW HOPKINS, *Clerk.*

BETWEEN THE HEIRS OF B. D. HOWARD, DEC'D, complainants, *and* ARCHIBALD HODGE & OTHERS, DEFENDANTS. } In chancery. No. 10.

In the circuit court of the United States for the western district of Texas, at Austin.

This agreement made between W'm Alexander, the solicitor & counsel for complainants in the above-entitled and numbered suit, and

Russell Howard, esq., one of said complainants, on the twenty-ninth day of December, A. D. eighteen hundred and sixty-nine, witnesseth:

That, whereas, on the fourth day of October last, Samuel A. Maverick, one of the defendants to said suit, did file in said suit a paper-writing claimed to be an affidavit or petition for a bill of review, which paper-writing was filed without notice or leave, while said Maverick was under attachment for contempt, and is interlined and erased without the interlineations and erasures being noted:

And, whereas said paper-writing sets forth statements of which the complainants in said suit have no personal knowledge, and which
280 said Alexander personally knows to be destitute of foundation in fact:

Now, therefore, in consideration of the premises, said Alexander, conceiving it to be his professional duty to relinquish his fee in said suit sooner than suffer the complainants therein to be wronged, and desiring and intending to make himself a disinterested witness in said suit, so far as said Maverick is concerned, has granted, released, and relinquished, and by these presents does grant, release, and relinquish unto said Russell Howard all his interest in so much of the John McMullen tract as has been located or claimed, or as is now claimed by said Maverick, expressly stipulating not to demand or receive the same, or any part thereof or any indemnity therefore, either directly or indirectly, it being his intention to hereby put himself in the same position, so far as the interest claimed by said Maverick is concerned, as if he never was entitled to any fee in said suit.

In witness whereof he has hereto set his hand on the day and date above written.

WILLIAM ALEXANDER.

[Stamp.]

281 *Exhibits to affidavit of W'm Alexander.—Filed Janu'y 7, 1870.*

Exhibits to affidavit filed Janu'y 7th, 1870, of W'm Alexander. Filed January 7th, 1870.

M. HOPKINS, *Clerk.*

Petition.

In this town of San Fernando, under the government of Texas, and Meu Fillipinas, on the 9th day of February- 1764, before us, the authorities (cabildo) of the town aforesaid was presented (writing) the petition of D'n Domingo Castelo, a citizen of said town, and married to one of the settlers thereof, and who served his Majesty since eight years old, who was an (alforly) or ensign at the presidio of San Saba, and actual (rejidor) alderman of this place, stating in due form, what follows: Finding myself possessor of some property, cattle, chattels, &c., as mine, my wife's as mine, and having no place nor pasture for the maintenance of my stock, I was compelled to settle that place known as San Lucas, where I built a house, and built enclosures, as is generally notorious to all—which said place being distant from this town eight leagues on the frontier of this town, in a northwest direction, on depopulated lands and public domain, as is known to you—for which I ask, pray, and supplicate that, through your orders and means, the certificate
282 be extended to me therein, mentioning the above situation thereof, that said lands are vacant, and were settled by myself only. All of which I supplicate your hon'rs to approve, and confirm, and cause

to be accepted in justice upon this common paper, there being none stamped. And I swear this my petition to be for the purposes therein set forth, and not for any malice. To which I certify, and will always pray.

DOMINGO CASTELO.

Act.

In view of the reasons set forth in the foregoing writing, we admit the same, as common paper; and, in regard to that which that party asks, we do hereby certify to the King our lord, (L. D. G.) to the most excellent viceroy of this New Spain, his royal audiences, when this may be presented, that it is true and certain that said lands as designated by D'n Domingo Castelo, are deserted and depopulated, and that no person up to these presents has settled the same, but the said Castello, who is actually a settler on the same. And in order to validate these presents on petition of said Castello, and upon this common paper, there being none stamped, we hereunto set our names before one another, there being no notary public or royal. To all of which we certify. Marcas de Castro, Pedro de Ocon y Arillo, Viente Alvarez Travieso, Franco Flores, Tomas Travireso, Juan José de Montes de Oca, Mirguel de Bergara.

283 *Writing.*

Con Ambrosio Zevallos, agent in fact of D'n Domingo Castello, citizen of the town of San Fernando, of the gov't of Texas and New Felipiras, by virtue thereof, appear before your honors and say that my principal is a steady settler of the place called San Lucas, being eight leagues distant from said town; that he has constructed a house and enclosures as stated in his petition to the cabildo, and certificate thereto annexed by the ayuntamento, one and the other of which were remitted to me to substantiate by these presents, and finding himself with some cattle, the property of himself & wife, for which he is bound to have subsistence, that is, pasture lands and also lands to cultivate, (lavoria,) and I exact the instrument in relation thereof with the necessary solemnity in one sheet, in which the notorious integrity of your hon'rs will be pleased to decree the adjudication to him of the said lands, situated as before mentioned; the same running from north to south from the hill called El Padron to the Paso de los Alamos; thence west by the Carnino de la Pita to the Arollo Penjasso; thence back north to the cañon road by the Lloma Alta to the said hill Ell Padron, and draw up the necessary documents for the execution of the same, so that the same may serve as a title to my said principal and his successors, in order that he may freely use, alienate, and dispose as his property, and
284 in the way and manner that he may deem best, and with the proper charges to them, his said heirs, made with the understanding that they give satisfaction for the value thereof to the person who may be appointed, and on the date that they be put in possession, certifying the proceedings had in the execution thereof, delivering him, my said principal, all the original papers for the better security of his rights. And if my said principal should require more lands adjoining t'ose mentioned, that he be granted them under the same restrictions, and provided they be vacant or interfere with the right of no one.

For all of which I supplicate your hon'rs, having presented said instrumen, you do the favor asked, by which my principal may receive relief.

AMBROSIO ZEBALLOS.

Decree.

MEXICO, *April 3d*, 1764.

As desired, the power and date passed to the attorney gen'l, approved by D'n Franc'o Anto. de Echavarri Caballero del orden de San Triayo of his Majesty's council, his senior officer to his royal audience in this New Spain, and privative judge of sales and dispositions of lands and waters (vacant) or public in this reign, who sealed the same with his official seal. Before me,

PEDRO LORENZO DEL VALLÉ,
Royal Sec'y.

The attorney gen'l, in view of this writing and the document presented by D'n Domingo Castello, citizen of the town of San Fernando, under the gov't of Texas, says that the said D'n Domingo Castelo
285 wishes the adjudication to him of the lands situated at the place called San Lucas, within the jurisdiction of said town, and which he supposed to be vacant, but the quantity of leagues or (carbarelliras) therein contained is not mentioned, nor does he say the time that he has settled the same; therefore, you will use due diligence to ascertain those points, and *and* give without delay information of the same.

Mexico, April 12th, 1764.

MARTIN DE ARAUEBURA, *Att. Gen'l.*

Decree.

MEXICO, *April 13th*, 1764.

As approved by the attorney general, and for the urgency of the time and distance, this decree, serving as a dispatch, is to command the alcalde of the 1st or 2nd vote of the town of San Fernando to proceed on a festival-day, at the hour of high mass, where the congregation is assembled, and publish at the usual place the petition and pretentions to said lands, in the Castill'an and in the language spoken by the Indians there, in order that it may reach the notice of all men and none plead ignorance; and that also official declarations be taken of five witnesses, each Spaniards, of age, and distinterested persons, who will declare, under oath, who has possessed the lands in question, if any, and up to what time; if they are public lands, and if so, if they were or not sold to others, mentioning whose are the adjoining lands; notify them
286 to attend personally, make a formal measure with corresponding plats, specifying the quality of the land; and also appoint two intelligent and scientific persons to accept the charge under which they are to express how many leagues of (ganador mayor) pasturer-lands, caralleria or solares, contain therein, its use, and if they possess water, and under the appraisement. You will cause the said lands to be exposed at public outcry for thirty days, continually, admitting the best bidders, from whom you will require security for the satisfaction of the same; and on the *and on the* last day of public outcry, you will designate a day for the closing of the sale, which will be made to D'n Domingo Castelo or to the best bidder, provided it am'ts to the appraisement; notifying said purchaser to repair before me at the royal hacienda, and pay the value thereof and receive a title in form. There being competitors, they will be notified to appear before me and better their bids within the time perem'torily given them, and in order that they may receive their titles as provided. In failure of which, the right of purchase will be declared against, and all damages caused by the

party so failing shall be charged, as if personally present, and the court will continue its proceedings until final adjudication. Conflicts with the interest of any one, or any community of Indians, together with any other information connected with the matter; the business being concluded, the proceedings therein held shall be remitted to this court, previously informing the party of the same. Approved and ordered by S'r D'n Franc'o Anto. Echravarri, of the order of St. James, of his M's council and senor of his M. audience and judge of this commission.

Sealed and signed before me.

PEDRO LORENZO DEL VALLE, *Sec.*

Act.

In the town of San Fernando, province of Texas and New Felipinis, on the 23 day of January, of this year, 1765, before me, D'n Bernave Carrabayal, alca'de ordinary of the first vote in said town, appeared D'n Domingo Castelo with a dispatch of three leaves, from his hon. the privative judge, bearing date April 13th, 1864, ordering the examination of five competent witnesses, in quality, age, knowledge, and science, to declare in due form and right what they know touching the matter in question, with D'n Domingo Castelo, in the application for lands; in compliance of which, I have ordered, and do hereby

288 order that D'n Marcus de Castro, D'n Juan de Oracha, D'n Juan Andreas Alvarez Traviesso, D'n Ygnacio Lorenzo de Armas, y Don Fran'co Estrias, all citizens of this town, and who possess the qualifications required, to be and appear before me at my office. Thus did I decree, order, and sign, with assisting witnesses, there being no notary public; on common paper, there being none stamped; all of which I certify.

BERNAVE CARABAYAL.

Ass. wit.:
JOSÉ JOACHIN FLORES.
CARLOS IGNACIO DE URAGAS.

Decl. of witnesses.

On this the 24th day of February, in this year, 1765, I, D'n Bernade Carabagal, alca'de ordinary of the first instance, in compliance with the command of the judge primitive, I caused to appear before me and those of my assistance the person of D'N MARCOS DE CASTRO, whom I personally know, and who took the oath before God our Lord and the sign of the cross, swore to make true answers to the questions asked him and tell truly all he knew.

Was asked did he know the arrollo San Lucas, and how long had he known that place?

Answered. That he knows said arrollo, and that since he had the use of reason he knew it.

Question. Did he knew or hear that said place was settled by

289 some person, and how long had it been settled?

Answered. That it had not been settled by any one; because he did not remember seeing people there, with the exception of a (chamaceerro) house or cor'al, which he was told were constructed by D'n Domingo Castello, two years since, more or less.

Questioned. Did he knew or heard whether said place was dipopulated, and public domain?

Answered. That he knew them to be royal lands and, as before said, unoccupied.

Questioned. If said lands, as royal and vacant lands, were ever granted or disposed of; if so, to give the name of the possessor, its lines, and who were the adjoining proprietors?

Answered. That said lands were not sold or disposed of; that, although the said D'n Domingo Castelo settled them in the manner as aforesaid, he does not know, and did not hear that he exercised any of the positions expressed in the question.

Questioned. If he had anything further to say on this matter.

Answered. That he had nothing further to say in the premises more than he had declared, which was the truth of what he knew.

Having perused his declaration, dated and ratified the same, he declared his age to be thirty-four years, and that he disinter-
290 ested, and signed with me, said alca'de ordinario of 1st inst., and ass'g witnesses, and on the present paper.

All of which I certify.

BERNAVE CARABAGAL.

Asst:
CARLOS YGNACIO DE URAGA, &
ALBERTO LOPEZ.

2d wit.

Instantly, on said day, month, and year, I, the said alca'de of 1st vote, present my assistents, I caused to appear at my office before me, D'N JUAN ANDRES ALVEREZ TRAVISCO, citizen of this town, whom I knew, and, being sworn, in the mode as before mentioned, to make true answers to all questions:

Being questioned if he knew the arrollo San Lucas, and how long it is since he knows the place?

Answered. That he knew it since he had the use of reason.

Questioned. If he knows or heard that said arrollo and its lands had been settled by anybody or not?

Answered. That he did not know that any person had settled it, with the exception of a house and an enclosure that D'n Domingo Castelo, a citizen of this town, had constructed on the San Lucas lands, which improvements, he had seen since about two years more or less.

Questioned. Whether he knew that said lands were public and vacant?

Answered. That he always recognized them as such; that the
291 only settlement he saw there since he knew the lands, is that of D'n Domingo Castelo.

Questioned. If said lands, as vacant and public, were ever disposed of, to give an account of its lines, boundaries, owner, and proprietor of lands adjoining the same.

Answered. That he did not know that said lands were granted to any one; that though D'n Domingo improved the place he never received the right to exercise true ownership.

Questioned. If he had anything further to say in the matters?

Answered. No; all he had declared is the truth of what he knew and answered.

Being further asked, under oath, his age, he declared to be twenty-six years of age; also, that he is disinterested in the matter; and he signed with me, said alca'de, and assistant witnesses, as before.

I certify to all.

BERNABE CARRABAGAL.
JUAN ANDRES ALVAREZ TRAVISCO.

CARLOS IGNACIO DE URAGA.
ALBERTO LOPEZ.

3d wit.

Immediately, and in compliance with the commands, I the said alca'de, in presence of those of my assistance, caused to appear D'N JUAN DE AROCHA, citizen of this town, whom I personally knew, and who, being duly sworn as before stated, by gov't, *ect.*, to answer correctly and truly all questions:

292 Being questioned. Did he know the arrollo San Lucas, and how long since?

Answered. That he knew the arollo San Lucas, *who* was yet very small, that is, since he had the age of reason; he commenced surveying the whole of that country.

Question. If he knew or heard that any body had settled there or not, and how long since.

Answered. That he did not know or heard that any person had settled there; that he heard it rumored by public voice that D'n Domingo Castello had a house and an enclosure on said place of San Lucas since about two years.

Questioned. If said lands are vacant or public domain.

Answered. That since he had the use of reason he knows them as such.

Questioned. If, as such public domain, said lands were not granted or disposed of.

Answered. That he knew of no other settlement than that of Castel'o; that no practise of ownership *were* manifested by him.

Questioned. If he had anything further to say in the matter.

Answered. He knew nothing more than what he had said in his declaration, all of which was nothing but the truth.

Declared that he was thirty-one years of age, and disinterested.

Whereunto we sign as the preceeding declaration.

BERNABE CARABAGAL.
JUAN DE ARACHA.

293 Ass't:
CARLOS YGNACIO DE URAGA,
ALBERTO LOPEZ.

4th wit.

Instantly, I, the said alca'de, and my assisting witnesses, in compliance with the command, caused to appear before me, at my office, w't's IGNACIO LORENZO DE ARMOS, citizen of this town, and whom I personally know, who, being duly sworn in the way and manner aforementioned to make true answers to all questions put to him and declare all he knew—

Was asked. If he knows the arollo San Lucas, and how long has he known that place.

Answered. That he knows said creek for more than thirty years.

Questioned. If he knows or heard it said if they were settled or possessed by any body or not, and how long they were settled.

Answered. That he did not know or heard said that said lands were possessed by any one, but D'n Domingo Castelo, a citizen of this town, built a house and some enclosures on the lands of said creek one year and months since.

Questioned. If, as such public domain, said lands were never ceded or granted, its situation, boundaries, etc.

294 That he does not know more than the settlement made by D'n Domingo Castelo, where no authority of ownership was exercised.

Questioned. If he had anything further to say on this matter.

Answered. That he had nothing more than what he declared, which is the whole truth.

And, under the same oath dated, affirmed, and ratified once, *ect.*, he was asked his age, which he declared to be sixty years, and totally disinterested; and signed the same with me, said alcalde, and my said assistant witnesses acting in lieu and for want of, *ect.*, *ect.*

To all of which I certify.

BARNABE CARABAGAL.
YGNACIO LORENZO DE AROMOS.

De ass:
CARLOS YGNACIO DE URAGA.
ALBERTO LOPEZ.

5th wit.

Instantly, I, said alca'de, present my assistance, in compliance with the commands, caused to appear before me, D'n FRANCISCO DE ESTRADO, a citizen of this town, whom I personally know, who, taking the oath in due form. *ect.*, to declare what he knew and true answers make to all questions put to him—

Was asked. If he knew the arrollo San Lucas, and how long since.

Answered. That he knew said arrollo San Lucas for thirty-four years.

295 Q. If he knew or heard that it was settled or possessed by any one or not.

Answ. That he did not know or hear of any one settling on it but D'n Domingo Castelo, who, two years from the date hereof, constructed a house and enclosure on said place.

Q. If said lamos were uncultivated, vacant, or public domain, and, as such, were not disposed of or granted to any one; if so, to give a detail of the boundaries, *ect.*, *ect.*

Ans. That he always knew said lands to be vacant or royal lands, with the exception of the settlement of D'n Domingo Castelo, but he did not seem to exercise acts of true ownership.

Q. If he had anything further to say on the buiseness.

Ans. That he has nothing further to say; that all he declared was the whole truth of what he knew.

Under the same oath, dated, affirmed, and ratified, *ect.*, he was asked his age, which he declared to sixty-four years, and disinterested in the matter.

All of which I certify in the way and manner as before stated.

BERNABE CARABAGAL.
FRAN'CO DE ESTRADA.

Ass't Wit.
CARLOS YGNACIO DE URAGA.
SILVESTRE YUACHIM DE SOTO.

1st test.

296 On the 5th day of February, of this year, 1765, in conformity with the command, I caused to appear before me and my assistant, D'n JUACHIM DE URUTIA, witness presented by D'n Domingo Castelo, whom I personally know, and who, taking the legal oath, *ect.*, sworn to declare all he knew and true answers make to all questions put to him,

Being asked if he knew the arrollo San Lucas, and how long since.
Answered, That he knew said creek since the year '33.
Q. Did know or heard that it was settled by any one or not.
Answ. That, since he knew the place, he knew of no settlement on the arrollo or its lands but that made by D'n Domingo Castello, two years since, that is, one house & enclosures.
Q. Are these lands uncultivated, vacant, or royal lands?
Ans. I always held them as such.
Q. If as such public domain they were not disposed of or granted; if so, to describe the boundaries, possessor, *ect., ect.*
Ans. He does not know or heard it said that they were; that, although D'n Domingo Castelo was there settle' as aforesaid, there never was declaration of possessor or ownership over the same.
Q. If he had anything further to say on the matter.
Said that he had nothing more than what he declared under oath.
Declared under same oath his age to be fifty years, and to be disinterested in the matter in question, which he signed, together with
297 myself and my ass'ts for want of, *ect., ect.*, as before stated.

To all of which I certify.

BERNABE CARABAGAL.
JUACHIM DE URUTIA.

Ass't wit:
SILVESTRO JUACHIM DE SOTO.
CARLOS YGNACIO DE URAGA.

2nd test.

Instantly, on said day, month, and year, I, the said alca'de, in presence of my said ass'ts, caused to appear before me D'n NICHOLAS CARABAGAL, whom I, personally , a witness produced by D'n Domingo Castello, who, being duly sworn to make true answers to such questions put to him, and declare all he knew—
Was asked if he knew the arrollo San Lucas, and how long since?
Ans. That he knows the place since he has the age of reason.
Q. Did he know or hear that it was possessed or settled by any one or not?
Ans. That he did not know or hear say that anybody has settled said place; that he had heard it said that since about two years, D'n Domingo Castelo had built a penns there.
Q. Were those lands vacant, or royal domain?
That he has known them as such with the exception of said cor'al.
Q. If, as such, they were not disposed of or granted; if so, to make a detail of the same?
Ans. That, although D'n Domingo Castelo, as is said, built a
298 penns thereon, he knows of no acts of ownership practised by any one.
Ques. Had he any to say about the matters?
Ans. No; all that which he declared was the truth; and he further declared that he was 49 years of age, and perfectly disinterested.
Whereupon it was ratified, signed, *ect., ect.*, as before mentioned.

BERNAVÉ CARABAGAL.
NICHOLAS CARABAGAL.

Ass't wit:
CARLOS YGNACIO DE URAGA.
SILVESTRA JUACHIM DE SOTO.

3d test.

Immediately, and on said day, month, and year, I, the said alca'de, present those of my assistance, in compliance with my orders, caused to appear before me ION SALINAS, citizen of this town, whom I personally know, and who, being duly sworn to declare all he knew and true answers make to all questions put to him—

Being asked if he knew the arrollo San Lucas, and how long he had been acquainted with the place.

Ans. That he knew the arrollo San Lucas for the last twenty-two years.

Q. If he knew or heard that any person had settled the place or not?

Ans. That he did not know or heard it said that it ever was settled by anybody.

Q. If they were vacant or royal domain?

Ans. That he always knew them for such.

299 Q. If so, whether they were not disposed of or granted, and the adjoining proprietors cited, and the boundaries thereof defined?

Ans. That he does not know that said lands were granted to any person, because, although D'n Domingo Castelo, a citizen of this town, has on said place of San Lucas a (chamacuero) house and enclosures, there was no acts of proprietorship practised, or any of the requisit's contained in the question, for he has been there for about two years.

Q. If he had anything else to say about this buiseness?

Ans. That he had nothing further to say, but that which he had declared, it being the whole truth, declaring to be forty-two years of age, & disinterested, and uninfluenced by any person.

All of which is certified in the form and manner before mentioned.

BERNABÉ CARRABAGAL.
JOSÉ SALINAS.

Ass't wit:

ALBERTO LOPEZ.
CARLOS YGNACIO DE URAGA.

4th test.

On said day, month, and year, I, the said alca'de, in compliance with my orders, caused to appear before me and my assisting witnesses, D'n JOSÉ XIMINES, citizen of this town, and a witness presented by D'n Domingo Castelo, who, being duly sworn in the manner before

300 stated, to make true answers to all questions put to him, and a true statement of what he knew—

Was asked if he knows the arrollo San Lucas, and how long since?

Ans. That he knows the arrollo San Lucas for the last thirty years.

Questioned. If he knew or heard that said creek and its lands were settled by any one or not?

Ans. That he did not know or heard that said lands were settled by anybody, with the exception of a house and enclosure made, as he heard, by D'n Domingo Castello, some two years since.

Q. If said lands were uncultivated, vacant, and public domain?

Ans. That he knew them for such royal lands.

Q. If he knew or heard that, as such public lands, they were disposed of; if were the adjoining proprietors notified, and the boundaries thereof specified.

Ans. That he only knows that said lands were not granted; that, although D'n Domingo Castelo settled the same, there never was acts of proprietorship manifested.

Q. If he had anything further to say in this matter?

Ans. That he had nothing more to say but what he had declare', all of which is truth. He further, under the oath, declared to be
301 fifty years of age, and uninfluenced by any one, and disinterested.

All of which is hereunto certified and signed in the manner and way before stated.

BERNABÉ CARABAGAL.

ALVERTO LOPEZ.
CARLOS YGNACIO DE URAGA.

5th test.

Instantly, I, the said alca'de, present my assisting witnesses, in compliance with the command caused to appear before me MARCOS CABRERA, citizen of this town, witness produced by D'n Domingo Castelo, who, being duly sworn in the manner before stated to relate what he knew and true answers make to all questions put to him—

Being asked if he knew the arrolla San Lucas, and how long since.

Ans. That he knew said place, and has known said arrollo since he had the use of reason.

Q. If he knew or heard that said lands were settled by any one or not?

Ans. That he did not know or heard it said that said lands were settled by anybody.

Q. If they were vacant and royal lands?

Ans. That he has known them as such from the public voice in this town.

Q. If, as such public domain, they were not disposed off or granted, & whether the adjoining proprietors were cited; the boundaries, *ect.*, defined?

Ans. That he does not know nor heard that said lands were
302 granted to anybody; that he only knows that on said place D'n Domingo Castelo built a house and enclosure two years since, but that no acts of ownership were practised, cor'oborating with the question.

Q. If he had anything further to say on this buiseness?

Ans. Nothing more than what he had declared, the whole of which is true. Stating under same oath to be thirty-nine years of age, uninfluenced and disinterested by any one.

The whole of which is authenticated, as before mentioned in the same way and manner.

BERNABÉ CARABAGAL.

ALVERTO LOPEZ.
CARLOS YGNACIO DE URAGA.

Said acts being approved by said alca'de ordinario.

And, for the ratification of the same, he ordered a re-examination of said witnesses, who made no alterations in their said declarations; in view of which said alcalde approved the same, and ordered a publication of the denuncia to be made in compliance, when he received a writing, the tenor of which is as follows:

Protest.

In the town of San Fernando, province of Texas and New Felipinas, on the 28th day of the month of January, 1765, before me, D'n Bernabé Carabagal, alcalde ordinary of the 1st votes, was presented
303 the following petitions by the Right Hon. President Friar Pedro Ramires de Brellano, president of the missions belonging to the Colledge of our Lady Guadelupe de las Zacaticas, minister in this province of S'r San José, in the name of the Indians thereof.

Petition.

To the alcalde of the 1st vote, D'n Bernabé Carabagal, the Friar Pedro Ramires, apostolic preacher of the missions belonging to the College of our Lady Guadelupe of Zacaticas, and minister hereof our Lord San José.

In the name of the Indians thereof before you, I appear and say, having heard that you are about to cause D'n Domingo Castelo to be put in possession of that place called San Lucas, and, by so doing, this mission being materially prejudiced on account of being the oldest settlers of *of* said lands, and thereby having the best right, as is known by the declaration of the same said Castelo, in a writing addressed to Captain Louis Antonio Masechaca, in which he confesses the existence of the pens used to pen the sheep belonging to this mission. And, if he did not confess it, the said Castello, this mission has the first and best right to said lands and *vilior*, forasmuch as without them they cannot
304 maintain their stock. And, if, nevertheless, the petition of said Castelo is *exceded* to, the stock of said mission will have to be driven twenty-five leagues distant to the place called San Miguel, with the risk of being lost, on account of the continual flight of the shepherds, to the great injury of said flocks, both from animals and otherwise. Also, the exposure of the Indians of dying without the benefit of clergy, and finally impeeding my assistance to them in any way on account of the great distance. And, although it is certain, this mission has already labored under this toil, it was to avoid greater dangers, for the said place called San Lucas is the main road of our northern enemies, and to avoid the total ruin of said Indian shepherds. And although it is not proved that said place called San Lucas belongs to this mission, it is because it was not designated in its foundation, for they were established under general laws granting them all the lands necessary for pasture and agriculture, and it is so precise and necessary to this mission, that, without it, it is impracticable to maintain stock or sheep; and, having in view this necessity, his hon. D'n Angel de Matros y Navarette,
305 governor of this province, denied to said Castello the possession or grant of said place. Although he spoke with his hon. several times on that subject, and in spite of the absolute power, said Castello proceeded and settled said point, of which he was dispossessed at two different times upon complaints and allegations of the people of this mission by Capt. Louis Antonio Minchaca. And if your proceedings are by orders of the primitive judge, I supplicate you to suspend the proceedings thereof until such time as his honor may hear this petition, and decide the rights according to law, right, and equity. And should you persist in the execution of the premises I contradict, annull, and protest against them once, twice, and three times, or as often as required, and I supplicate you to return these presents to me, with the answer thereto,

to be liable to the use that these Indians may put it to. For all of which I supplicate your hon. will adhere to, and decide according to justice, which is all I ask, and I swear by the soul of these Indians not to be actuated by malice, but solely through the urgency of the case.

Friar PEDRO RAMIRES DE ARRELLANO.

306 *Act.*

Having made myself possessed of the petition, and in view of the prayer of the Right Hon. Pres't Friar Pedro Ramirez de Arrallano, in the same contained, in the name of the natural Indians of said mission, in regard to the suspension of proceedings, which are to take place under the order of D'n Fran'co Anto de Echavarri, of the order of St. James, of his Majesty's council and senior officer to his royal audience of Mexico, and primitiv judge of this commission, in order that the S'r D'n Angel de Martos y Navarette may give a decision upon the matter, I should command, and, by these presents, do order that, inasmuch as special power is in me vested in the order of his hon. the prim. judge, touching the application for lands made by D'n Domingo Castillo upon the San Lucas, the Indians of the Mission of San José, will in due form be notified, or their lawful representative to proved and be eye-witnesses to the measurement of the lands of San Lucas, so that if they have any obligations to make touching its boundaries as adjoining proprie-
307 tors that it may be decided according to its merits and the justice of the matter, and that the petition of R. P. Friar Pedro Ramirez de Arrillano be returned him for the uses and ends then and there put to by the Indians of his mission, and that this original be inserted to the proceedings. All of which I approve, and certify, and sign together with ass'g witnesses, for want of notary public, and upon this common paper, for want, *ect.*, *ect.*

BERNABÉ CARABAGAL.

Ass't wit:
CARLOS YGNACIO DE URAGO.
ALVERTO LOPEZ.

In the town of San Fernando, juris*au*tion of the province of Texas and New Fillipinus, on this 28th day of the month of January, 1765, before me, D'n Bernabe Carabagal, ordinary alcalde of 1st inst., was presented the following petition:

Petition.

To the alcalde of the 1st vote, Don Bernave Carabagal, the petition of Baltazar Perez, citizen of this town of San Fernando, would respectfully and in legal form say that it has reached his notice that the survey that you are about to make, under orders of the hon. primitiv judge of compositions of lands and waters of these riegas, under petition
308 of D'n Domingo Castelo, also a citizen of this town, I am prejudiced by said measurement, and it conflicts with the greater part of my pasture-lands, the title of which, in due solemnity, I have present' for your inspection, and which you will thereafter return. And in order that the orders of his hon. the prim. judge may be governed by the laws and ordinances in the premises made and provided, order that the same be executed without conflicting with a third person of better right. I supplicate that you be pleased to suspend said survey and further proceedings, or if they are continued that they conflict not

with my said lands, that is, in the measurement from the Loma del Pedron, which should be a straight course to the river Medina, or to the road conducting to the mission del cañon, which is where I am prejudiced. And I do hereby protest that if I suffer any injury in the proceedings, I shall proceed before competent authorities against any and every person so injuring. For all of which I further supplicate that
309 you suspend said survey, or that it be executed without injury to a third person, according to the wish of the King, our lord, God preserve him, and the command of his hon. the prim. judge, and with justice. This instrument, with your decision, you will be pleased to return to my hands for the ends that I may deem required, admitting this my petition on common paper, there being none stamped. And I swear not to be actuated by malice, but solely sup'licating the vindication of my rights.

BALTAZAR PEREZ.

Act.

The petition of Baltazar Lopez on presentment was admitted on common paper for the reasons therein set forth, and with due attention to what he asks in his said petition and the administration of his grant made by D'n Angel de Martos y Navarette, actual governor of this province, of four leag'es of land. In virtue thereof I say, and in accordance with the orders of D'n Fran'co An'to de Echavarri, knight of the order of St. James, of his Maj.'s council and senior of his audience, *ect.*, and judge of this commission, I should order, and by these pres-
310 ents order, that this petitioner be notified to appear at the measurement of the lands of the arrollo San Lucas, in order that, as an eye-witness of said proceedings and demarcation made by D'n Domingo Castello, citizen of this town, then & there take exceptions, if any he has, to the execution of the orders; and, as asked, his documents will be returned to him, and the original will be annexed to these proce'dings.

To all of which I certify, *ect.*, *ect.*, *ect.*

BERNABÉ CARABAGAL.

Ass't wit.:
ALBERTO LOPEZ.
CARLOS IGNACIO DE URAGAS.

Petition.

And having published the application made of the said place called San Lucas, in order that all might understand it and not plead ignorance, by order of said alcalde judge commissario, the proceedings were continued, and the following act received:

Paper.

To the alcalde, Dn. Bernave Carabagal:

I received yours with the judgement accompanying the same, and, in view of having trampled upon the sacred rights which this mission *which this mission* has for many years had to the place called San Lucas, and having denied the suspension of proceedings until such time
311 as this mission could alegate her rights before his hon. the primi. judge: Therefore, I thank you for the invitation to assist and

witness the survey. I will not assisst: in the first place, because I, by thes' presents, annulled you' said proceedings, and, in the second place, because this mission has no designated lands, nor in her foundation is there any mention; but it shall have and use the necessary lands for the raising of cattle and cultivation, and, under these circumstances, there should be measured and designated lands to this mission, and within its appurtenances designate two leagues of pasture-lands conceeded by the superiour to Miss. Concep.; and, after the determined boundaries of said survey, you might proceed and make such other surveys as you might deem fit. Therefore, if you have authority and power to assign and measure lands to this mission I will concur with you as soon as you notify me, and, on the contrary, I will assist to nothing and annull the whole proceedings.

I have the hon. to be, *ect.*

Mission San José, February 16th, 1765.

Friar PEDRO RAMIREZ.

Act.

In the town of San Fernando de Austria, on this 22nd day of
312 February, 1765, I, the said alcalde, in prosecution of the duties devolved on me by the proceedings, and in consideration of having published and participated unto all men generally, and especially to the adjoining proprietors of the San Lucas lands, in order that they may assist at the measurement that I am to make of said lands, who, having failed to appear personally or by ag't, said proprietors, I have, and, by these presents command that the measurement of these lands commence, for the execution of which I appoint Don Nicholas Carrabagal, a citizen of said town, a person in whom ample confidence may be placed, and who will be notified of this nomination, who, upon acceptance thereof, will come forward and be qualified in due form to proceed and survey the lands comprehended within the boundaries referred to in the application of D'n Domingo Castelo, of the arrollo San Lucas.

To all of which I certify in the form and manner before mentioned.

BERNAVÉ CARABAGAL.

Ass't wit.:
ALVERTO LOPEZ.
CARLOS YGNACIO DE URAGA.

Accept. of test.

On the said day, month, and year, I, the said judge, present those of my assist*ance*, I proclaimed the nomination of Don Nicholas
313 Carabayal, citizen of said town, who, accepting the same, came forward and qualified, swearing to discharge the duties dev*oted* on him faithfully, and without taking in or leaving out any of the land mentioned in the denunnciation of D'n Domingo Castelo, all of which was certified and signed in my presence, *ect.*, *ect.*

BERNAVÉ CARABAGAL.
NICHOLAS CARABAYAL.

Ass. wit.:
ALBERTO LOPEZ.
CARLOS YGNACIO BRAYA.

Insp'n of land.

On this 25th day of the month of February, 1765, being at the place or arrallo San Lucas, within the jurisdiction of the province of Texas,

Don Nicholas Carabagal, before me, the said alcalde, and the witnesses of my assistan*ance*, having seen the place and the limits contained in the application of D'n Domingo Castelo, he measured and marked the said limits in this form: At the Loma del Padron, where the survey commenced, has for mark and sign its elevation, and at its head it forms a table, covered with brush and other small trees; and, from said Loma Hill, running from north to south to the pass of the arrollo de los Alamos, notwithstanding a land-mark was placed on the edge of the road leading to presidio Rio Grande, by planting a cross at the foot of a large mosquito, and following the said road west to the ar-
314 rollo de Pariachias, where a corner-mark was placed, and turning north to the road coming from the cañ*n*ons by the Lloma Alto, where a land mark was placed by piling of stones, and a short distance from the land-mark of Baltazar Perez, adjoining proprietor, and thence following an east course to the said Loma de Pedron, where a corner-mark was placed by piling rock, and the whole comprehended within said limits, he declared to be eleven leagues of pasture-lands which are within the jurisdiction of this province, and Coahuila, the Medina River being the dividing lines between said provinces; that the lands belonging to this jurisdiction are five leagues of pasture-lands, and that they are proper for raising cattle; that, although it is a level country it cannot be irrig*it*ated for want of water. Co*mpetent* that the San Lucas springs dries up, and is of little utility. The lands comprehended in the jurisdiction of Coahuila are six leagues of pasture-lands, the same in every respect to the former. It was given for the central point of said tract, a certain hill, a little elevated, situated on the margin of said Medina River, surrounded by a small creek, and being lands that,
315 for its inhabitants there are deplorable risks for their lives on account of our barbarous northern enemies, as also from the rascally Apaches and fugitive tribes. Said eleven leagu's of pasture-lands are appraised at four (reals) bits each, all of which acts certify to be true; and, to substantiate the same, I being personally present at the whole proceeding, I hereunto set my hand, and witness that of surveyor aforesaid.

BERNABE CARABAGAL.
NICHOLAS CARABAGAL.

Ass't wit.:
ALVERTO LOPEZ,
CARLOS YGNACIO DE URAGA.

Act.

On this 15th day of the month of May, 1765, I, Ber*a*nabé Carrabagal, in fact of the 1st vote of this town of San Fernando, in compliance with the provisions of the commission delivered from his hon. D'n Franc'o Antonio de Echavarri, knight of the order of St. James, of his Majesty's council, and senior of his royal audience of Mexico, and primitive judge of lands and water of these riegues, by virtue of having discharged all the duties devolved on me by said superior command and commission, with the exception of exposing said lands at public outcry, they being measured and appraised, and found to contain eleven
316 leagues of pasture-land, comprehended in this province and that of Coahuila, I should order, and by these presents command, that, on to-morrow, after high mass, at the sound of a drum and voice of public crier, at the most conspicuous places of this vicinity, at the doors of the principal houses, it be made known to all men present, and

reach the notice of all absent, that the eleven leagues situated on the San Lucas were appraised at four reales each, in favor of his Majesty, which will continue to be thus cried for the term of thirty consecutive days, besides the day assigned for the final sale of the same to the best bidder; and, in order that it attract the notice of all men, and that not thereafter plead ignorance, thus do I decree, com'and, certify, and sign these presents in the way and capacity before-mentioned, together with ass't witnesses.

BERNAVE CARABAGAL.
ALVERTO LOPEZ.
YGNACIO DE URAGA.

Reason.

And having cried said lands for the term of thirty days, as required in the preceeding act, on the eight day thereof, appeared D'n Bernardo Miranda, citizen of the town of San Fernando, and in the name and for the part of the native Indians of the Mission of San José, from whom he manifested complete power, and who, bidding upon the said
317 eleven leagues of pasture-land the sum of one hundred dollars, which bid, during the remaining days of outcry, was not bettered, in view of which said alcalde, in due form caused, for the final sale of said land, that Don Domingo Castelo and the attorney aforesaid of said Indians of the Mission of San José, who proposed to give security for any higher bid, should it be required on said day, they were made to understand the other act of said judge, which they answered in the following manner:

Not'n.

At said royal houses, on the said day, month, & year, I, the said judge, by virtue of the commands of the preceeding acts, known to D'n Domingo Castelo and D'n Bernardo de Miranda, and it being understood that there was no higher bidder than the Indians of San José, the sum of one hundred dollars, they said, in the first place, D'n Domingo Castelo, in due observation for the act, acknowledge the better bid of the representatives of the Indians of San José; and D'n Bernardo de Miranda said, in due obedience, *ect.*, that there being no higher bid than that of one hundred dollars, that in case of necessity, and for
318 the great need of said lands of San Lucas to said Indians of San José, he would bid more before the priv. judge, and this they gave as their agreement, and signed the same in my presence. All of which I certify, *ect., ect.*

BERNAVE CARABAGAL.
DOMINGO CASTELO.
BERNARDO DE MIRANDA.

Ass't wit':
CARLOS YGNACIO DE URAGA
ALVERTO LOPEZ.

Adju'n.

In the town of San Fernando, on the 17th day of June, 1765, I, the said judge, in view of the answers given by D'n Domingo Castelo and Don Bernardo de Miranda, and the said D'n Domingo, refusing to make a better bid, as said answers shows, and the offer of Don Bernardo of

bidding more, if necessary, before the priv. judge, I should order, and by these presents command, that, in compliance with the commission of the said judge priv., the said eleven league' of land situated on the San Lucas, be, and are hereby, struck down to the Indians of Mission of San José, for the expressed sum of one hundred dollars; and thus I caused the said attorney D'n Bernardo de Miranda to appear before me, whom I made acquainted with the adjudication of San Lucas, and that he repair before his hon. the priv. judge to pay said sum of one
319 hundred dollars, being the am't for which said land was struck off. Asking the testimony which seemed convenient of all my proceedings, with an insertion of the commission of his hon. the priv. judge, and assign him the perem'tory time with which he is to present himself in the city of Mexico before said judge, and make the payment aforesaid, and conclude the business before said tribunal. All of which I approved and certified in the way and manner required and necessary.

BERNAVE CARRABAGAL.

Ass't wit.:
ALBERTO LOPEZ.
CARLOS YGNACIO DE URAGA.

Notif'n.

Instantly, I, the said judge, by virtue of the contents of the preceeding act, I caused to appear before me, Don Bernardo Miranda, with whom I am acquainted. I made him acquainted with said act, all of which he obeyed and consented to; but, in regard to the delay of appearance before the priv. judge, he supplicated that, in consideration of the great distance, being near 400 leagues from this to the city of Mexico, and the roads being impracticable on account of the rigourous drought, the want of pasture, and scarcity of water, that sufficient time be granted
320 him for said voyage, and he asks the corresponding testimony of said proceedings for the ends required.

All of which I certify, ect. ect.

BERNAVE CARABAGAL.
BERMORDO DE MIRANDA.

Ass't witnesses:
CARLOS YGNACIO DE URAGAS.
ALBERTO LOPEZ.

Act.

On the 18th day of said month and year, I, said judge, by virtue of having fully closed the proceedings, pursuant to the orders of the supreme judge, caused to appear before me, at my office, Don Domingo Castelo, and Don Bernardo de Miranda, agent for the people of San José, citing that they be and appear personally, within the perem'tory time of four months from the date hereof, before his hon. Don Francisco Anto. de Echavarri, knight, *ect.*, *ect.*, *ect.*, then and there to conclude the proceeding of the sale of land before stated; in failure of which it will be determined and adjudicated by that tribunal in the manner and way that that tribunal may deem just and equitable as if you were per-

sonally present; and, for the better defence of their controversy, I command that a certified copy of proceedings be granted.

To all of which I certify.

BERNAVE CARABAGAL.

Ass't wit.:
CARLOS YGNACIO URARGA.
ALBERTO LOPEZ.

Notif'on.

Instantly, I, the said judge, by virtue of the preceeding act by me extended, I caused Don Domingo Castelo, and Don Bernardo de
321 Miranda, agent of the people of San José, whom I personally knew, and to whom, being present, I read and made them acquainted with said act, who, understanding it, answered—Don Domingo Castelo—that if he was not furnished with the original papers he would not sign this act, no' suffer any testimony in the premises. And I, said judge, in order that it might not have the light of vexation assented to his demand, reserving the right to remit myself said proceedings to his hon. the priv. judge, and Don Bernardo, the agent of the Indians of San José, declared that he was satisfied with the time given to present himself in Mexico, and required the certified copy referred to.

All of which he signed in my presence. To validate all of which, I sign, *ect., ect.*

BERNAVE CARABAGAL.
BERNARDO DE MIRANDA.

Ass. wit.:
CARLOS YGNACIO DE URAGA.
ALBERTO LOPEZ.

Inf'n.

To the Hon. Priv. Judge D'n FRAN'CO ANTONIO DE ECHAVARRI:

SIR: I received the commission decreed by you in regard to the application made by D'n Domingo Castelo for the lands situated on the arrollo San Lucas, and, having informed myself of its contents, I proceeded to the discharge of the duties therein required, and these are to
put you in entire knowledge of the lands applied for do not con-
322 flict with the right of a third person, nor any community of Indians, and, although you will see in the proceedings that there were some contradictions and competitors in the case, still I proceeded with the proceedings, being desirous of doing justice until concluded. Let the adjudication be in whom it may, it is not to the injury of any person whoever, and I make free to say that the injury existing may be tolerated, as it goes to the benefit of his Majesty. The lands were public and vacant, and always were known as such, and I, who was raised in this province, vouch them to be royal lands. I have seen the stock of San José pasture on them, likewise the cattle of this village, but that was not induced by the want of pasture-lands, or because they were in any extreme necessity, for there is abundance of pasture-lands; and I defy any person or mission to al'edge that said lands belong to them on account of having them stocked with cattle. The Mission of San José has four or five thousand head of sheep which they pasture over an extent of twenty-five leagues and in all parts they have she'p-folds and enclosures. Whereby they alledge in their writing that they have such and such

lands stocked with cattle, which prevents others from occupying
323 them, so that you may be assured, sir, that if applications for lands are not more frequent it is for the high respect held to the rev. fathers of the missions, they having monopolized the lands in general so that the families from the islands with all their supposed honors and merits are oblige' to contend themselves with small portions of land that they have obtained, more against than by the good will of those rev'd fathers, to that degree, that this extensive province might have a population as great as that of Saltillo, because the climate is temperate and the lands are extremely, fertile, and there is water in abundance for irrigation; extensive plains sufficient to maintain a large population, but as those lands and waters are solely occupied by the missions as stock-farms to the great privations and inconveniences of the inhabitants, and especially frustrating the benefit that might result to his Majesty in the population of his dominions; and, as said inhabitants cannot support themselves in numbers, some have left this province and gone to other parts, to seek better advantages. The missions of San Antonio-Conception and that of San Juan de Capistrano, in one body without any division whatever are in the posession of more
324 than one hundred and sixty leagues of land; that of the Espada and San José do not possess much less, but rather more; the mission of San Antonio possess a great quantity of lands, comprehending the possession of separate leagues from those above cited. And this, your hon., is no exag'eration but the certain truth that can at all times be proved; and most certain it is that if the said missions were confined to their proper limits, there would be an abundant population and this extensive province would be prosperous. And it is only your hon. who can apply a proper remedy to those evils, that so lamentably exist these many years, which I must sincerely pray may be done away with. The existence of which is so contrary to the service of both their Majesties, and for the redress of which I beseech His Divine Majesty, that he prolong your important life many years for the redress of his province and the well being of its inhabitants. And I shall be happy at all times to comply with your honour's superior dictates and precepts which shall be to me an oracle and guide.

Town of San Fernando de Austria, September 20th, 1765, B. L. B.

Your humble servant, *ect.*, *ect.*,

BARNAVÉ CARABAGAL.

325 To the Hon. Priv. Judge Dm FRANCO ANTO. DE ECHAVARRI.

SIR: The little or no practice I have had in managing business of this nature may, no doubt, have caused me to have committed errors, of which I have no doubt there are many, but your goodness, I confidently hope, will pardon such, as they have proceeded from the head and not from the heart; for I assure you that I have been actuated throughout by the most zealous desire to most religiously comply with my duty and the advancement of the will of his Majesty, but, notwithstanding my incapacity, I shall more than happy to be favored with your superior orders, and they shall be attended to with all due diligence, as such service will be to me an exquisite enjoyment of pleasure. And I pray that your important life may be prolonged many years.

Village of San Fernando de Austria, September 20th, 1765.

Your excellency's most faithful servant and minor subject.

BERNAVÉ CARABAGAL.

Letter.

To Friar ROGIN XIMENES.

DEAR SIR: When your reverence was at this mission you were informed of the troubles that Domingo Castelo caused to this
326 mission respecting the lands of San Lucas, which he desired to possess. In the first place he forcibly made two attempts to possess them, causing a great deal of trouble to the people of this mission, so that the military captain of this part, being informed of the injury and damages done them by the occupancy of said lands by said Castelo, he ordered him to retire and withdraw from said place, he being convinced that the depriving said mission of said lands, as pasture for their herds of cattle, would compel them to seek some range, they being so hem'd in by the Mission of Espada and the village of San Fernando, and the lands *and the lands* assigned to the Mission of Concepcion, which is two leagues of pasture-land. Your reverence knows the distance between the arrollo de la Peidro and the Palo Quimado, which is the limits of the Espada and the village of San Fernando, and which, you perceive, is but a narrow strip of about half a league, and within said strip the Mission of the Concepcion's two leagues are four leagues in length, more or less. So that this mission, for the maintainance of their immense herds necessarily require the lands of San Lucas entirely. Your rev'r'ce also knows that this mission was estab-
327 lished under the universal law that directs that there shall be given to this mission all the lands they may require, and it is known to be the best mission of this province; and it is notorious that they possess a large stock of all kinds of animals, which cannot be maintained without pasture-lands. And to neglect those Indians by giving the preference to a person of yesterday, without any other merit than a self-sufficiency, and not having the most absolute necessaries for the settling of said lands. Your rev'r'ce is also aware that, in his failure to influence the governor *the governor* of this province to sell him said lands, as also to prevail with the captain, he next went to the city of Mexico, from whence he has returned with orders from his hon. the priv. judge of S'r Echavarri to the alcalde of this village of San Fernando, directing him *him* to measure said lands and sell them at public out-cry, and striking them down to the highest bidder. And, although this mission represented to the said alcalde their grievances in the case, there was no attention paid to them, but the proceed-
328 ings were continued, and as the only bid made against said Castelo was by the people of this mission, and to whom said lands were knocked down for the sum of one hundred dollars, which will be seen in proceeding of said sale, and to which said alcalde says that he has sent to his hon. the priv. judge, but which I doubt he has done, and suspect that he has given them to Castelo, together with the hundred dollars which was bid by this mission, which I hope your reverence will attend to by inquiring of his hon., Judge Echavarri. Now the matter stands opposite him, because, although his mission was appraised of the adjudication in its favour for the sum of one hundred dollars, still it was not paid. Therefore I fear that Castelo, under the circumstances, will frame a new scheme.

I remit to your rev'ce my petition, praying the suspension of proceedings in the premises, and the answer thereto. The fact is, if Castelo obtains the said lands, let a place be designated for the removal of this mission. And you please pay attention to all of this, in order that the judge may understand the circumstances, to whom I do not write

329 at present, for not being personally acquainted with him. You will please give him to understand that it is this mission that maintains the province, because San Saba Ynoquiso and La Bahia, the most of the year, are maintained with corn & beans, and other products from this mission; and, in case he doubts the truth of these assertions, he may authorize legal inquiries to be made of D'n Hugo, a person who is entirely disinterested. I would write to your rev'ce more fully on the subject, but fearing considered too interested.

I pray that God may grant your rev'ce a long life and the enjoyment of good health.

Mission of San José, April 9th, 1765.

Your countryman and brother,

Friar PEDRO RAMIREZ.

Writing.

I, J'n Benito Gomez de Ibarbura, ag't in this court for the religious affairs of the province of Holy Evangelical Mission of San José, in the jurisdiction of Texas, village of San Fernando, respecting the lands petitioned for by D'n Domingo Castelo, and the proceedings had in the case, I say that there having be' remitted to this office said proceedings by the justice of said village, in which my clients are interested, (having rights to alle*d*ge,) you will please order that said proceeding' be remitted to me within the legal time, which I persist you will so
330 order, in justice, and I formally swear to what is necessary. *ect.*

BERNITO LOMEZ YBARBURA.

Decree.

MEXICO, *June 1st*, 1766.

The above being a party, I do hereby order that the said proceedings be delivered to him within the legal time.

In testimony whereof the said priv. judge of sale and regulation of lands, *ect.*, *ect.*, did hereunto set his hand and seal before me.

PEDRO LORENZO DEL VALSE,
Royal Secretary.

Writing.

I, Benito Gomez Ybarbura, agent at this court for the mission named San José, in the jurisdiction of the *toure* of San Fernando, in the province of Texas, respecting the proceedings had on certain lands petitioned for by D'n Domingo Castelo, an inhabitant of said village, touching the proceedings, as directed to be taken on said subject, I say that the same sprung from the application which was made to you' hon. by said Castelo, in April, of the year 1764, respecting the adjudication of land selected in said jurisdiction, in that place called San Lucas, offering to pay the appraised value of the same, as also requiring others, if he should thereafter want them, as is maintained in his petition of two leaves, and as by the same proceedings it is in proof, from the
331 information, that, in compliance with the directions received, that said lands had hardly been occupied until January of the past year, 1765, by said D'n Domingo, although the representation of said alcalde sets forth that he occupied them two years, alle*d*ging thereby that he merited that lands should be adjudicated to him. And it is also in proof,

the same proceedings, that they were not sold to any person whatever by which he himself acknowledges; because, after having published the proceedings that were to take place respecting the same, and caused by the petition of said Don Domingo, there appeared no person to lay any claim to said lands; and the only opposition that the said Domingo met with in his pretentions to said lands were my clients, the people of said mission, not because they had a right by purchase of the same, as they confess in their written communication on the subject, containing 14 leaves, but because they possessed other various merits, which merits they then represented, and which said Castello did not dare to contradict; therefore they must be esteemed as true. And, on the part of my clients, I here again produce them, and in the writing of the president of the mission, in the name of the people of San José, is set
332–'3 forth that the said people were possessors of said lands which said Castelo confessed to Captain Louis Ant'o Minchaca; as also, that the said mission had still existing enclosures, in which they enclosed their stock. It was also represented that the adjudication of Castelo of said would result in a great deal of injury to the said mission; so much so, that they could not maintain their stock without them; and, at the time they possessed those lands, they found it necessary, for a time, to move of' their stock to a place called San Miguel, 25 leagues distant from said mission, to avoid their being taken by the savage Indians, and, consequently, at such a great distance, that their shepherds were very much exposed to die without the benefit of clergy; and as also, there has been no lands assigned to them. Said Castelo took the advantage of petitioning for said lands, although he has attempted the same heretofore with the previous gov'r of said province, D'n Angel Martos de Navarette, wherein he was refused, because he knew they were essentially necessary for the use of said mission; and, notwithstanding that, Castelo never contradicted the above meritorious claim. My clients, the people of said mission, seeing in the case continued, they came
334 forward and made a bid of one hundred dollars for said lands, with a view of removing all kind of dispute and controversy, and the advantageous differences of said bid may be seen by comparing it with *it* the sum that it was appraised of, being fifty cents, 4 reales, for each of eleven leagues, calculated to be the quantity comprised in said place; that there being no sufficiency of water they were of little value, as also the dangerous location for settlers who run the risk of losing their lives by the savage enemies; and, after the sale being concluded, there being no person to bid higher, and Castelo expres'ly, the said lands were adjudicated in favor of my clients, the people of said mission, for the consideration of the sum of one hundred dollars, on the 17th of June, A. D. 1765. Castelo being notified at the same time to appear before this court in the term of four months, if he thought proper to bid higher, and to which place the proceedings would be remitted, which he has not done, now one year passed. And in addition to all this it appears that there is no regard paid to what the com'issioner, said alcalde has said
335 on his letter, on leaves 31, wherein he says that my clients have fed their stock on said lands, and although he supposes that they have a great quantity of lands, he expressly says that their stock range over more than 25 leagues, which is what my clients acknowledge; and, what is still more aggravating is, that he still expects the adjudication of said lands in his favor. And most true it is that the said commissioner alcalde says that the said proceeding does not injure any person or persons whatsoever, which he avers to be the truth in his own personal knowledge, having, as he says, been raised in that province; that they

are public lands, as in proof, their occupancy by the people of the mission is also mentioned; that in attention to their necessities said lands were refused to said Castelo by the governor of said province, as also by Captain Menchaca, and there has been no lands assigned to the people of said mission to feed their stock or for agricultural purposes. In consideration of the above approve and adjudicate the same for the said sum of one hundred dollars, the payment of which sum is at any time
336 ready, and in consequence whereof your hon. will please cause the corresponding testimony to be herewith expedited, that it may serve as a title to cause the party to be put in possession of said lands. All of which I certify to, and supplicate your hon. to confer this favour, which is justice. I swear the necessary, *ect.*, *ect.*

BENITO GOMEZ DE YBARBURA.
Sec'o JOSÉ MARIANO DE FORREN.

Decree.

MEXICO, *July* 10*th*, 1766.

Let the transcription of the foregoing proceedings be served upon the other party, to be answered or not within the time prescribed by law, and then pass said acts to the attorney gen'l. Such is the decree of D'n Franco Ant'o de Echavarri, knight, *ect.*, *ect.*, *ect.*

Signed and sealed before me.

PEDRO LORENZO DEL VALLE,
Royal Sec'y.

Not'f'n.

CITY OF MEXICO, *July* 11*th*, 1766.

I, the undersigned have notified D'n Ambrosio Zeballos, and served him with a transcription of the foregoing instrument, who, understanding the nature thereof, acknowledged service; to which I certify.

PEDRO LORENZO DEL VALLE, *R. S.*

Writing.

D'n Benito Gomez Ybarbura, in the name of the mission of San
337 José, in the jurisdiction of the town of San Fernando, in the province of Texas, respecting the lands petitioned for by D'n Castelo, with due respect I say that a copy of my notice having been duly served upon the attorney of said Castelo, and he having failed to appear and answer the same within the time prescribed by law, and of this failure of this I do hereby accuse him. Your hon. will please order that the proceedings be sent to the attorney gen'l as provided. All of which your petitioners will ever pray, in justice.

BERNITO GOMEZ DE YBARBURA.

Decree.

MEXICO, *July* 19*th*, 1766.

The term having expired, the party accused of default, let the acts pass to the att'y gen'l.

Thus orders D'n Fran'o Ant'o de Echavarri, knight, priv. judge, *ect.*, *ect.*, *ect.* Signs and seals before me.

PEDRO LORENZO DEL VALLE, *S. R.*

Receipt of att'y gen'l.

The attorney gen'l, in view of these acts of application for lands made by D'n Domingo Castello, within the jurisdiction of the town of San Fernando, province of Texas, says that, in the proceedings had, it seems that said lands are vacant and royal domain; that there exists no controversy requiring the disposition of witnesses upon one or the
338 other part; that said parties agree with him as much as it is affirmed by *by* the cabildo of said town on the 1st and 2nd tug't, and it is properly found in said proceedings that, upon examination made by the alcalde of first vote of said lands, with his assistance, he found that eleven leagues were contained within the specified boundaries, a part of which lies in the province of Texas and the other in that of Coahuila, with a spring subject to dry up at times; and that said lands were valued at four reales each league on account of being exposed to the excursions of the barbarous Indian tribes of the north and the brigand Apaches and the other fugitive tribes. These lands were applied for, as before stated, by said Domingo Castelo offering to satisfy the am't of appraisement thereof; but to this the people of the mission of San José made opposition, alledging that they had not received their corresponding quantum of land; that there were no lands in the vicinity assigned to them whereupon to feed their stock; that they had occupied these lands a length of time before the petitioner; that the
339 latter had scarcely occupied them two years, and that, against the will of the people; and, moreover, that they bid the sum of one hundred dollars, and that said petitioner, knowing that said bid was against him, he answered that he would not better the bid; when, consequently, said land was struck down, and adjudicated to the people of said mission; and the parties being cited on the 18th day of Jan'y last, 1765, to appear before this court within the term of four months. In consideration of all this, as also, *as also*, the said petitioner did not make a higher bid, neither did he appear within the time assigned him, he well knowing that the said bid far exceeded the appraised value, as it likewise does the price of lands lying at such a distance, as also that *that* Indian communities must always have the preference in the disposal of lands, as is provided in the 19th law of title, the 12th book, the 4th of the recapitulation of the kingdom. Speaking of the disposition of lands, therefore, you will please approve the adjudication made in favor of said natives, ordering the payment of the sum bid for said lands to be made into the royal treasury, an account of which, together with these acts, will be sent to the royal audiance; after which, without delay, there will be given a corresponding title, with the necessary qualifications.

Mexico, July 30th, 1766.

MARTIN DE ARAMBURO,
Att'y at Law.

340 *Decree.*

MEXICO, *August 7th*, 1766.

In consideration of the proceeding by the instructions of the att'y gen'l, followed and complied with, in furtherance of which pass the proceedings to the royal audience to recieve their confirmation of the adjudication of said lands; and on return of the same be a title given to the party.

By order of his hon., D'n Fra'co Ant'o de Echavarri, knight & priv. judge, *ect.*, *ect.*

Signed and sealed before me.

PEDRO LORENZO DEL VALLE, *Royal Sc'y.*

The following proposition was made or signed, with a rubrica:

BARIOR, *Consul.*

MOST POWERFUL LORD: The result of an application for public lands situated within the jurisdiction of by D'n Domingo Castelo having been verified by the sale of eleven leagues of pasture-lands to the population of Indians of the Mission San José for the am't of one hundred dollars, as the accompanying document will show, in conformity with the 19th schedule of instructions of the 15th of October, 1754, for the confirmation of said sale, which, with your lordship's pleasure, you will please approve the said sale, and extend the accustomed title, provided the am't thereof be paid into the royal treasury, returning to me the proceedings. And that which will be agreeable to your highness will always be considered best.

Mexico, August 8th, 1766.

D'N FRAN'O ANT'O DE ECHAVARRI.

Decree.

341 MEXICO, *August 11th*, 1766.

To the ATTORNEY GEN'L.

MOST POWERFUL SIR: In view of the preceeding proceedings the att'y gen'l recommends, without hesitation, the confirmation of the sale of lands therein made to the Indians of the Mission of San José, which sale, therefore, your lordship will please confirm, and order the return of said proceedings to the privitive judge of lands and water, in order that he may extend the customary title in form.

Mexico, 10th of October, 1766.

VELARDE.

Decree.

MEXICO, *Nov. 8th*, 1766.

Let the advice and council of the att'y gen'l be assented to, and that the party purchasing pay the sum of fifty dollars for the benefit of not having to repair to the royal and supreme Indian council for the confirmation.

Signed with a rubric, by their lordships—

TORO MALO.
VIVA DE MIRA.
VILLA URUTIA.
MILGAREJO.

Act.

In the city of Mexico, on the 8th day of November, 1766, their lordships, the president and members of the royal audience of New Spain, having seen the proceedings, had, by order of his hon. the priv. judge

of lands, respecting a petition made by D'n Domingo Castelo, of eleven leagues of pasture-lands, and which terminated in the adjudication of said lands to the Indians of the Mission of San José, for the sum of one hundred dollars, by the same court from where the said proceed-
342 ings were sent to this royal audiance for their confirmation, pursuant to the 19th royal schedule to which his Majesty's fiscal officer refers *to* in his answer of the 11th Oct., ult.; and, as he directs that the proceedings be returned to the same office, in order that a title in the customary form be given, therefore, they have, and thereby do order, that the request of his Majesty's fiscal officer be granted, the native Indians of the Mission of San José paying fifty dollars for the benefit they receive of not being oblge' to go to the royal and supreme council of the Indians for the confirmation of said sale.

So it is ordered and signed by their lordships, Toro Malo, Riva de Mira, Ville Urutia, Milgarego.

Before me—

JUAN JOSÉ DE ZARARUA.

This is a true copy of the original here on file.

JUAN JOSÉ DE ZARARUA.

Decree.

MEXICO, *Nov. 18th*, 1766.

In consideration of the foregoing acts, I do hereby order that the mandates of their lordship' of the royal audiance, and in conformity, that the sum of one hundred and fifty dollars be made in the royal treasury, without the interest, on account of being Indians of the population of Mission San José, to whom the sale of eleven leagues of land is approved, and the same is granted to them by way of sale, for
343 their labors, pastures, *ect.*, and other purposes, without the right of alienating, ceeding, or selling any part thereof without the exp*ense* license of the superior government of this reign, under the penalty of annulling this sale, without prejudice to his Majesty, or to a third person, and upon the payment of said sum of one hundred and fifty dollars, from which will be deducted twenty of two per cent. on ac't of one thousand dollars, the title will be given with a copy of these acts to the letter.

This is ordered by hon. Don Franco Antonio de Echavarri, knight, *ect.*, *ect.*, *ect.*

Signed and sealed before me—

PEDRO LORENZO DEL VALLE,
Royal Sec'y.

Bill.

Messrs. Fiscal Officer of the royal treasury and coffers of this court:

You will please cause the receipt of the sum of one hundred and fifty dollars to be made from the Indians of the Mission of San José, in the province of Texas, for the sale, approbation, and confirmation of eleven leagues of pasture-lands, adjudicated to them in manner of sale. Said sum will be set apart, with explanation, for its remission to Spain in the customary form, and on the payment thereof, a certificate or receipt will be given, which will form part of these proceedings.

Mexico, Nov. 18th, 1766.

344 FRANCO ANT'O DE ECHAVARRI.

Filing.

Filed at the tribunal of royal audiance of accounts this 22nd Nov., 1766. Signed with a rubric.

Payment.

On this 22nd day of Nov., 1766, were received into the royal coffers the one hundred and fifty contained in the bill.

VALDEZ, *Clurc.*

A copy of the original remaining in the archives that at present are under my charge.

In testimony whereof, and in virtue of the mandate contained in the title and grant made to said natives on the 19th of the present month and year, I give these presents in the city of Mexico, on the 22d day of Nov., A. D. 1766, containing 45 leaves, including this, the first, and its corresponding leave of the fourth seal (sillo cuarto,) and the balance on common paper.

Witnesses: Don Bernardo Carrascal, D'n José Callado, and D'n Main de Legarribay, citizens of this city.

All of which I certify to be true.

PEDRO LORENZO DEL VALLE,
Royal Sec'y.

STATE OF TEXAS,
County of Bexar:

I, P. L. Buynor, sworn interpretor to the hon. dist. court for the spring term, A. D. 1847, do hereby certify that the within instru
345 ment, consisting of 25 pages, is a true and correct translation of the original, to my best of knowledge and belief.

P. L. BUYNOR,
Interpretor, D. C.

And afterwards, to wit, on the 10th day of Janu'y, A. D. 1870, the following entry appears upon the rule or order book of said court, to wit:

B. D. HOWARD'S HEIRS *vs.* HODGE ET ALS. } 10. Ch'y. January 10, 1870.

And now comes the solicitors of complainants and file the affidavits of Lorenzo Castro.

Filed Janu'y 10, '71.

M. HOPKINS, *Clerk.*

Which affidavit is endorsed: "In chanc'y. No. 10. B. D. Howard's Heirs vs. A. Hodge & als. Affidavit of Lorenzo Castro. Filed January 10, 1870. M. Hopkins, clerk;" and which is in words to wit:

346 Affidavit of Lorenzo Castro. Filed Jan'y 10, 1870.

M. HOPKINS, *Clerk.*

In the U. S. circuit court for the western district of Texas, at Austin

THE HEIRS OF B. D. HOWARD
vs.
ARCHIBALD HODGE ET ALS. } In chancery. No. 10.

LORE'ZO CASTRO, who is hereinafter styled affiant, being duly sworn, on oath says that Henry Castro, now deceased, settled and took possession of the McMullen grant under an executory contract with John McMullen, now deceased, and under the title of said McMullen, which has been in controversy in said suit, and founded the town of Castroville, under the same, on the 2nd day of September, 1844, as appears by the annexed proces-verbal, made a part of this affidavit, the same being a certified copy from the records of Bexar County, which is hereto attached, and most of said parties whose names are mentioned in said proces-verbal have been in continuous possession under said title from said date up to the present time, as well as many others, who settled on the said grants as emigrants of Castro's colony, & whose names do not appear therein.

Certified copy of contract and additional agreements hereto annexed.

LORENZO CASTRO.

Sworn to & subscribed before me this the 8th June, 1870.

F. D. MOSELEY,
Master in Ch'c'y U. S. Circuit C't W. D. T.

198.

347 Procès-verbal de la prise de possession des terres de la concescion faite *pour* la gouvernement texien à Mr. H. T. Castro, dans le comté de St. Antonio de Bexar, 15 *f*evrier 1842, ainsi que de celle lui ap'art*e*nan'.

Nous soussignées, colons engagés en France por Mr. H. T. Castro, pour partager les avantages de la concession mention'ée ci-dessus dans *l*os limites assigné's *pour* le gouvern'ment texien et exprimé's dans un contrat passé entre nous & ledit Castro, déclarons:

Que ledit Castro nous a*y*ont réunis *at* St. Antonio de Bexar, s'est mit à notre tête pour nous conduire sur *l*os terres qui nous sont assignées et donn*ier* por lui; qu'en cons*i*quence nous avons quit'é St. Anto. le 1re sept'b'r pour nous rendre sur la rivière Medina, 25 *miles west* de St. Anto., où nous sommes arrivés le deux. Nous déclarons qu'indépendant de notre contrat de concession & sans y être obligé, ledit Castro nous a fait les avantages ci-après pour nous faciliter notre prompt établissement.

Suit les avantages sus-nommés:

1o. A cha*quun* de nous quarante acres de terre à lui appartenant sur la rivière Medina.

2o. Les moyens de transport & notre nourriture assurée jusqu'au moment où nos maisons seront construites.

348 3o. Des bœufs & des chevaux jusqu'à la récolte prochaine.

4o. Du maïs & du lard qu'il nous prête jusqu'à la récolte prochaine.

5o. Des vaches pour en avoir le lait.

Nous déclarons que le sieur Jno. James, arpenteure juré du govern'ment e't venu sur *l*os lieux & s'occupe d'arpenter les lots qui nous sont assignés. Nous déclarons que depuis douze jours que nous sommes rendues à notice d*i*stination nos travaux ont été assez rapidement con-

duits par une bonne direction pour nous promettre sous sept à huit semaines un abri convenable pour nous & nos familles. Nous sommes satisfaits par l'expérience que nous avons acquise, le climat du comté de S'n Anto. de Bexar est des plus salubres, que los eaus sont délicieuces, le bois abondant, et que la terra paroît réunir toutes les conditions voulues pour une grande fertilité. Telles sont les auspices sous lesquels nous nous établissons & qui forment la base de nos espirances. Nous avons unanimement réosolu d'appeler la ville dont nous somme' les fondateurs Castroville.

Fait à Castroville, sur la Medina, comté de Bexar, le douze september mil huit cent quarante-quatre.

JEAN BAPTISTE LECOMTE.
TORE.
GENTITZ.
349 FRETETTIRE.
BOURGOIS.
LOUIS HUTH.
GEO. CUPPLES.
CHAS. GUBBARD.
FAIVRE.
RISIÉ FORGEAIN.
BOULLOT NUS.
MAINS.
CHAPOY.
MACLES.
LEOPOLD.
MINITRIEUR.
THEOPHILE MERCIER.
ANTONI GOLLY.
BSSHZY.
VSSUMDNER.
LINDSOZSY GRAF.
JASAMMURLY ARTHUR.
G. L. HAAS.
CHARLES DE MONTEL.
SAX GASPARD.
SPANI DURS.
TRIDE RISEG.
JOSEPH HAGELEN.
JOSEPH DISCHER.
HARRIS.
YOUNG.
VSSURZOB GUISNIXNUS.
JUSONOR BUFAU.
JOSEPH CIRTRALL.
JACOB HYUBRY.
GYGALL JOZUZH M. PUBUR.
ANTON CRIH.
AUGUGHINNER W. BUBER.
TRIDGRASZORBRY.
JOSEPH LYORBIG.
BARTZ.
SIMON MICHEL.
JOSORMURS.
L. JULLNRR.
JOSEPH BADER.
BSORULY LYOLLUR POSU.
JOSEPH BADER.
JOHN ZUFORT NYON.
BERTHOLD BARTH.
JEAN ULRIC ZURCHES.
LORENZ ZISNR.
JERIEZ ONAFUL.

Nous soussignées, juge de paix et constable de Castroville, sur la Medina, comté de Bexar, 24m *west* de la ville de S'n Antonio de Bexar, certifions que les signatures des ci-après nommés, qui ont signé le présent procès-verbal, ont été *opposé* en notre présence, et que toute *fait* peut y être accordée.

HUTH, LOUIS.
CUPPLES, GEORGE.
BOURGOIS, JULES SIMON.
GENTITY, J. L. THEODORE.
GOUBAUD, CHARLES.
GASPARD, SOX.
CHAPPOY TR. CLOVIS.
SCHNEIDER, PHILIPPE.
GRAF, LOUIS.
BARTH, BERTHOID.
YOUNG HAVIR.
HALLER JUAN.
AUGUSTO.
HAAS, LOUIS.
DE MONTIS.
CHARLES.
MONOTRAR (LEOPOLD.)
SPAIN VERS.
BUNELL (JOSEPH.)
WEBER.
JOSEPH MACHCLAN FRANC.
LECOMTE.
JEAN BAP'TO FORGEANNA.
JEAN NICHOLAS.

HAGUSLIN, JOSEPH.
350 BADER JOSEPH LUDRIG.
ZACHARIE STEPHAN.
JEAN ZURCHER.
ULRICH.
ERATH.
ANTONIO.
DIAHEER JUAN.
HANS LEONARD.
ISSELL.
ANTONIO.
HABY, NICHOLAS.
HABY, JOSEPH.
ARTIL, GEORGES SIMON.
MICHEL PRETTETTAM.
BOILLOT, DENIS.
GOLLY, ANTONI.
RHIN, LOUIS.
BUNEL.
JOSEPH HABY.
JACQUES, RISIC.
J'H MARIE.
SCHYENHAC, JACOB.
MERCIER (THEOPHILE.)
FAIVRE (JEAN.)
JOSEPH.
MARC.
MATHA WEBER.
AUGUSTA BARTZ.

Castroville, sur la Medina, le douze septembre, mil huit cent quarante-quatre.

G. L. HAAS,
Constable.
LOUIS HUTH,
Juge de Paix.
BURGEOIS,
Juge de Paix.

REPUBLIC OF TEXAS, *County of Bexar:*

I, the undersigned, do hereby certify that Louis Huth & Simon J. Bourgois are justices of the peace & G. L. Haas constable for Castroville, in this county.

Given under my hand and official seal, at San Antonio de Bexar, this 5th day of October, A. D. 1844.

[L. S.] DAVID MORGAN,
Chief Justice, Bexar County.

Un pour legislation de la signature de Mr. David Morgan, opposées ci-dessus, l'agent consulaire de France à Bexar, par intérieur.

FONTREL, AINE. [L. S.]

351 REPUBLIC OF TEXAS, *County of Bexar:*

Be it known that, on the day of the date hereof, Denis Fontril personally came before me, the undersigned, clerk of the county court and records in and for the said county, and acknowledged that he had signed and affixed the seal to the foregoing instrument of French writing as his act and deed in the capacity of cousular agent pro tempore of the government of France in San Antonio, county aforesaid. And I certify that I know the said Denis Fontrel who made the said acknowledgement to be the individual who executed the same, and together with the probate certificate of the two justices of the peace and constable of said county, and the certificate of the chief justice thereof, which to me is satisfactory evidence of the execution of the said foregoing instrument of writing hereunto annexed.

Witness my official signature and the impress of the seal of said court, at my office, in the city of San Antonio, this 7th day of October, A. D. one thousand eight hundred and forty-four.

[L. S.] THO'S HO'S ADDICKS, *Clk.*

I, Tho's Ho's Addicks, clerk of the county court and recorder
352 in and for the county of Bexar, in the Republic of Texas, do hereby certify the instrument of French writing hereunto annexed was this day delivered to me for registration; therefore the same is here filed for record in my office this 7th day of October, A. D. 1844.

THO'S HO'S ADDICKS, *Clk.*

REPUBLIC OF TEXAS, *County of Bexar:*

In testimony that the preceding two pages and twenty lines contain a perfect transcript of the record of the matter therein mentioned, I, Tho's Ho's Addicks, clerk of the county court of said county, hereto set my name & affix the impress of the seal of said court, at my office, in the city of San Antonio, this 23d day of November, A. D. 1844.

[L. S.] THO'S HO'S ADDICKS, *Clk.*

353 REPUBLIC OF TEXAS, *County of Bexar:*

Articles of agreement made and concluded the twenty-second day of August, in the year one thousand eight hundred and forty-four, between John McMullen, of the one part, and Henri Castro, of the other part, both of the Republic and county aforesaid.

The said John McMullen, for the consideration hereinafter mentioned, and upon the conditions herein expressed, doth, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said Henri Castro, his heirs and assigns, that he, the said John McMullen, shall and will, by such deed or deeds of conveyance as may be proper and necessary, well and sufficiently grant, convey, and assure unto the said Henri Castro, his heirs and assigns, in fee-simple, clear of all incumberances, one equal half of all that certain piece, parcel, and tract of land situated, lying, and being on the Medina River, in the county aforesaid, the same being more particularly designated and described by the plat, boundaries, and description herewith annexed, signed by the parties hereto, and made a part of this agreement.

The said tract of land, the half whereof is herein covenanted to
354 be conveyed as aforesaid, being understood to include all the lands designated within the boundaries described in said plat, excepting such as are therein designated and marked as being the property of others, and also one league and a half previously bargained and sold to one Thomas J. Devine, and to be by him hereafter selected; the remaining part or portion claimed by the said John McMullen and herein covenanted to be conveyed being estimated to contain sixteen leagues, more or less. The said John McMullen further covenants and agrees to and with the said Henri Castro, his heirs and assigns, that he, the said John McMullen, shall and will, at the proper cost and expense of the said Henri Castro, his heirs and assigns, make, execute, and deliver said deeds of conveyance before mentioned, in manner and form and for such portions of said tract as hereinafter mentioned, so soon as the said Henri Castro, his heirs and assigns, may demand the same, after the performance upon their part of all and singular the covenants and agreements herein expressed by him or them to be performed.

In consideration whereof, the said Henry Castro, his heirs and assigns, doth covenant, promise, and agree to and with the said John McMullen, his heirs and assigns, that he, the said Henry Castro, his heirs
355 or assigns, shall and will pay or cause to be paid, unto the said John McMullen, his heirs or assigns, the sum of two thousand

dollars, so soon as the same is demanded, after the termination of a certain suit now pending in the district court of said county, wherein the title to said tract of land is involved, provided the said suit terminates in favor of John McMullen, or as soon as the said John McMullen can convey a clear and indisputable title to the lands herein covenanted to be conveyed. And the said Henri Castro further covenants and agrees that, within the period of two years and four months after such title can be conveyed, he, the said Castro, his heirs or assigns, shall and will, at his own proper cost and charge, cause the said tract of land to be surveyed into quarter sections, or tracts of one hundred and sixty acres each, and the corners of each tract to be plainly designated and established, and also shall and will, before the expiration of the said two years and four months, settle upon one half the number of said tracts, and actual settler or occupant, who shall occupy and reside upon the tract so settled upon for the space of three years, the said tracts to be settled and occupied in the manner following, to wit: The first
356 tract being occupied, then every second tract thereafter, leaving every other or intermediate tract unsettled and vacant.

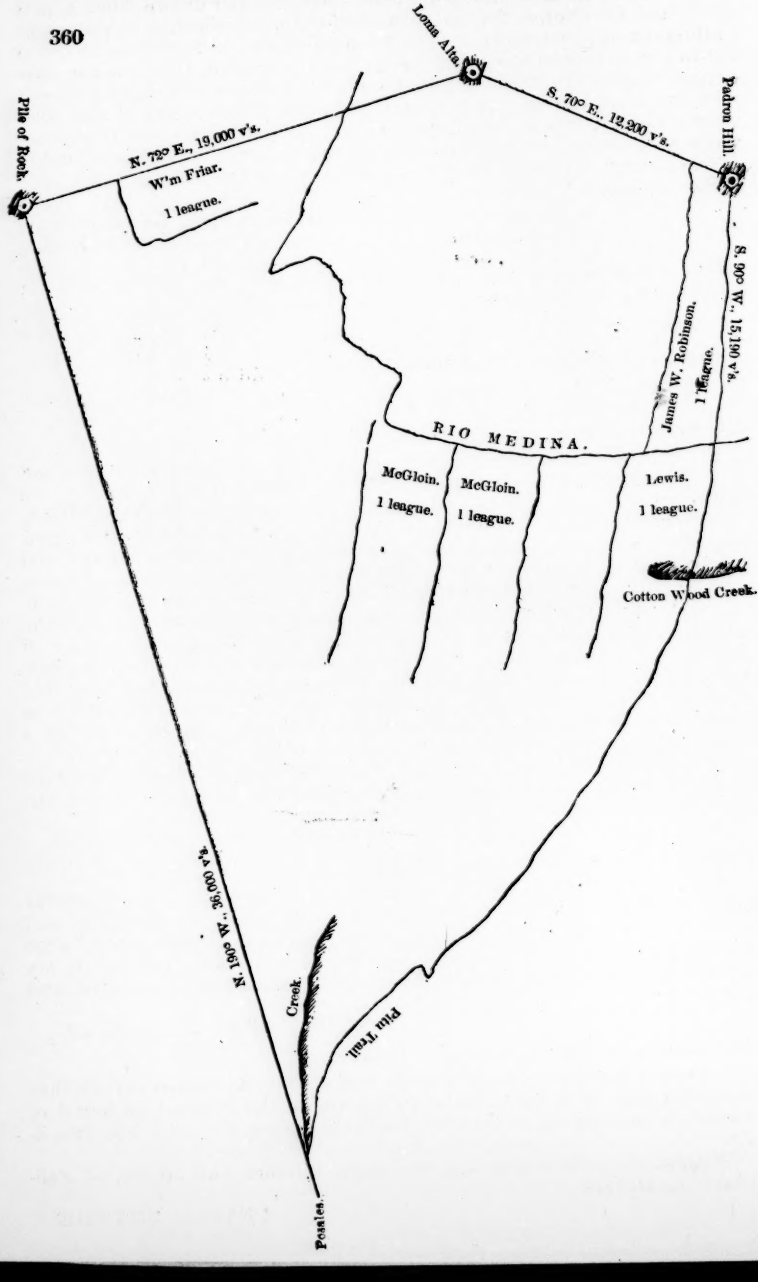
And the said John McMullen, for himself, his heirs, executors, and administrators, further covenants and agrees to and with the said Henri Castro, his heirs and assigns, that upon the performance of the covenants and conditions herein covenanted to be performed by the said Henri Castro, that he, the said John McMullen, shall and will convey, as before covenanted and agreed, to the said Henri Castro, his heirs and assigns, all and singular the tracts occupied and settled as aforesaid, and reserving to himself, the said John McMullen, each and every intermediate and unoccupied tract, and the timber, for his own use and benefit. And it is further covenanted and agreed by and between both of the parties to these presents, that, in the event of an actual war and occupancy of any part of the western frontier by the public enmemy, then, and in that case, said term of two years and four months shall be extended as much longer as the same shall be occupied by the enmemy as aforesaid. And it is further covenanted and agreed by and between both of the
357 parties to these presents, and it is hereby declared to be the true intention and meaning of these presents, that if it is ascertained and found, that a portion of the tracts to be surveyed as aforesaid, will not admit of occupancy or cultivation, then, and in that event, the said Henri Castro, his heirs or assigns, shall have the liberty and privilege of sett'ing more than one occupant upon other occupied tracts, and shall receive and be entitled to the same lands that is herein covenanted to be conveyed, provided he settle upon said tract as large a number of occupants as half the number of said tracts; and also, if the said Henri Castro, his heirs or assigns, should fail to settle and convey the whole of said tract as herein provided and contemplated, then the said John McMullen, after the expiration of said term shall convey and assure, unto the said Henri Castro, his heirs and assigns, the tracts actually settled and occupied at that time, provided the said Henri Castro, his heirs and assigns, shall have settled as herein described at least eight leagues of said tract, and that a fair, full, and just proportion of the back lands of said tract shall be included in said
358 actual settlement. And it is further covenanted and agreed by and between both of the parties to these presents, that if the said Henri Castro his heirs or assigns, shall fail to settle within the time herein mentioned, the said eight leagues, then, and in that event, the said Henri Castro shall forfeit the said payment of two thousand dollars, and shall only receive one-half of each quarter section actually

settled and occupied by the said Henri Castro, as herein provided, which half of said quarter section shall be conveyed by the said John McMullen to the said Henri Castro, his heirs and assigns, and shall include the improvements made by the settler or occupant thereof. And it is further covenanted and agreed by and between both of the parties to these presents, that the said Henri Castro may and shall have the liberty, right, and privilege, at his discretion, to lay out and establish upon any part of said tract, one or more town sites, reserving and setting apart in each, sufficient squares for a church, public school, and burrying ground, and the lots in said town shall be surveyed, settled, and conveyed, and reserved in the same manner as the tracts or quarter
359 sections before mentioned. And if the said John McMullen shall or should lay out or establish upon any or either of the quarter sections reserved by him, a town or towns within the time before mentioned, then and in that event the said Henri Castro, his heirs or assigns, shall be entitled to every intermediate lot in said town, upon the same conditions of settlement as before mentioned. And for the faithful performance of all and singular the covenants, conditions, and agreements herein contained, the parties to these presents for themselves, and for each of their heirs, executors, administrators, and assigns, bind themselves, each to the other, firmly by these presents.

In testimony whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

[SEAL.] JOHN McMULLEN.
[SEAL.] HR. CASTRO.

Signed, sealed, and delivered in presence of—
D. C. VAN DERLISS.
W. J. RIDDLE.


360
Loma Alta.
Padron Hill.
Pile of Rock.
N. 72° E., 19,000 v's.
S. 70° E., 12,200 v's.
W'm Friar.
1 league.
S. 90° W., 15,190 v's.
James W. Robinson.
1 league.
RIO MEDINA.
McGloin.
1 league.
McGloin.
1 league.
Lewis.
1 league.
Cotton Wood Creek.
N. 19° W., 36,000 v's.
Creek.
Piss Trail.
Posies.

361 This plat as a true copy of a tract of land drawn from a plat and field-notes of a survey made for John McMullen by James B. Callingsworth, a deputy surveyor, by order of the district court of Bexar County, which commences on the top of the Padron Hill; thence running S. 9° W., 15,190 v's, to the crossing of Cottonwood Creek; thence with the meanders of the Pita trail or road to the crossing of said road on the Rosales Creek; thence N. 19° W., 36,000 v's, to a pile of rock set forth as a corner of this survey; thence N. 72° E., 19,000 v's, to top of the Loma Alta; thence S. 72° E., 12,200 v's, to the place of beginning.

San Antonio.

JOHN JAMES, *Surveyor.*
JOHN C. HAYS, *C. S. B. C.*

The foregoing boundaries and plat to the same are referred to in the agreement hereunto annexed.

JOHN McMULLEN.
H'R CASTRO.

Signed by the parties in presence of—
D. C. VAN DERLISS.
W. J. RIDDLE.

REPUBLIC OF TEXAS:

Be it known that, on the day of the date hereof, John McMullen and Henry Castro came before me, the undersigned, clerk of the
362 county court and recorder in for the county of Bexar, and severally acknowledged that they had signed, sealed, and delivered the within and foregoing articles of agreement and boundaries and plat of survey thereto annexed for the purposes therein set forth, and I certify that I know the said John McMullen and Henry Castrow, who made the said acknowledgement, to be the individual' described in and who executed the said articles of agreement, with boundaries & plat of survey as aforesaid. Also, came before me, clerk and recorder as aforesaid, John C. Hays, who personally acknowledged that he had executed the within instrument of writing and plat of survey as his official act as county surveyor in and for the county aforesaid. To all of which I hereby certify for record in my office.

In testimony whereof I hereunto set my hand and official signature and seal, at my office in the city of San Antonio, this 24th day of August, A. D. one thousand eight hundred and forty-four.

THO'S HO'S ADDICK, *Clk.*

REPUBLIC OF TEXAS, *County of Bexar:*

I, Tho's Ho's Addick, clerk of the county court and recorder
363 in and for the said county, hereby certify that the foregoing and within instrument, written, were presented and delivered to me for registration; therefore the same are here filed for record, in my office, this 24th day of August, A. D. one thousand eight hundred and forty-four.

THO'S HO'S ADDICK, *Clk.*

THE STATE OF TEXAS, *County of Bexar:*

I, Peyton Smythe, county clerk of said county, do hereby certify that the foregoing is a true and correct copy of the original, as found of record in my office, in book B No. 2, on pages No. 293, 294, 295, & 296.

Witness my official seal and signature, at office, this 3d day of February, A. D. 1868.

[L. S.] PEYTON SMYTHE.

It is mutually agreed between John McMullen and Henry Castro, this day and date hereof, that, in the division of the lands situated in front of the town site of Castroville, Mrs. Castro shall have from the pass in front of the town and run above, and that Mrs. McMullen shall have from same pass and run below. Mrs. Castro being allowed to
364 complete in a body the settlement of his people or settlers now here, numbering sixty-three, amounting to two thousand five hundred and twenty acres; which agreement is hereby made and considered as part and parcel of our previous agreement, bearing date 22nd day of August, A. D. 1844, recorded in the recorder's office of the county of Bexar in book B No. 2, upon pages 293, 294, 295, & 296, record of deeds. McMullen, by these presents, resigning the intermittent lots to that number of settlers. The line from the pass running due east.

In witness whereof the parties aforesaid hereto set their manus and affix their scrolls by way of seal, at San Antonio de Bexar, this 24th day of November, A. D. 1844.

JOHN McMULLEN. [SEAL.]
H'Y CASTRO. [SEAL.]

Witnesses:
GEO. CUPPLE.
P. L. BUYNOR.

REPUBLIC OF TEXAS, *County of Bexar:*

Be it known that I, the undersigned, clerk of the county court in and for the county aforesaid, do hereby certify that John McMullen and Henry Castro, parties to the within written agreement, bearing date with these presents, personally appeared before me, at my office in the said county, and signed affixed their scrolls by way of seal, & ac-
365 knowledged the same to be their act and deed, which was done and de-livered, in duplicate, in my presence and of the subscribing witnesses.

Given under my official signature and impress of seal, in the city of San Antonio, this 24th day of November, A. D. 1844.

[L. S.] THO'S HO'S ADDICKS, *Clerk.*

I certify that the within written agreement having been to me presented and delivered for registration, the same is hereby filed for record, in my office, this 24th day of November, A. D. 1844.

THO'S HO'S ADDICKS,
Clerk County Court.

THE STATE OF TEXAS, *County of Bexar:*

I, Peyton Smythe, county clerk of said county, do hereby certify that the foregoing is a true copy of the original, as found on record in my office in book C No. 2, on pages 5 & 6.

Witness my official seal and signature, at office in San Antonio, this 3d day of Febr'y, A. D. 1868.

[L. S.] PEYTON SMYTHE,
Co. Clerk, B. Co.

366 And afterwards, to wit, on the 18th day of January, A. D. 1870, the following affidavit and accompanying letters was filed in said cause, to wit:

Affidavit of F. W. Chandler, & accompanying letters. Filed January 18, 1870.

M. HOPKINS, *Clerk.*

SAMUEL A. MAVERICK
vs.
B. D. HOWARD'S HEIRS & OTHERS.

Personally appeared before me, the undersigned authority, F. W. Chandler, who, being duly sworn according to law, says: That, some time during the late war, affiant thinks it was in 1863 or 1864, but he does not remember which, Samuel Maverick, one of the defendants in the case of Howard's Heirs against S. A. Maverick & others, called upon affiant, in the city of Austin, while the Confederate States court was in session, and proposed to employ affiant to defend him, Maverick, in said cause; at the same time he, Maverick, said that he had previously employed Governor E. M. Pease or Mess'. Harris & Pease, affiant is not positive which, and that from some cause Pease had not attended to it; and that he had been told there was some order or judgment in the case against him in the cause, and he requested affiant to look into it and let him know what he would charge to defend him. At the same time he, Maverick, said that Judge T. J. Devine had advised him to get affiant to defend him, and that Devine owned an interest in the land in
367 controversy. Upon the request of the said Maverick, affiant did get the papers in the cause, and went to the court and took a full memorandum of the condition of the case, which he showed to the defendant Maverick, and also to Judge Devine; that affiant told defendant Maverick that there was a judgment pro confesso entered against him for want of an answer, and then gave the date of the judgment, but affiant does not now recollect the date when affiant gave the defendant Maverick the above information about the condition of the cause, and more of details that he cannot now recollect minutely enough to state; he, affiant, further stated to Maverick what he would charge him as a fee to defend it, and the defendant Maverick declined to give it. Thereupon affiant returned the papers to the court and there the matter ended between the defendant Maverick and affiant. Affiant further states that he informed Judge Devine that Mr. Maverick and himself had failed to agree upon a fee, and that affiant would not appear in the said cause.

F. W. CHANDLER.

Sworn to and subscribed before me this 18 day of January, 1870.

M. HOPKINS, *Clerk.*

The subjoined letter from Mess'. Moore & Shelly and the reply of F. W. Chandler, are in words to wit;

368 AUSTIN, TEXAS, *January* 17, 1870.

F. W. CHANDLER, Esq., *Austin, Texas:*

For the purpose of protecting the interest of the plaintiffs' in the case of Howard's Heirs vs. Samuel A. Maverick and others, pending some time since on the chancery side of the docket of the United States circuit court, at Austin, and also for the purpose of doing justice to your brother members of the bar, who, during the pendency of said suit were attorneys and solicitors for the plaintiffs in said suit, we feel constrained to

request that you will furnish an affidavit setting forth the facts communicated by you to said Samuel A. Maverick in regard to condition of the record in said case at that time, together with the circumstances which led to said communication from you to said Maverick, and to the reasons why said Maverick declined employing you as his solicitor in said suit; and, as near as you can, the date of said conversation between yourself and said Maverick.

Respectfully your ob't servants,

MOORE & SHELLY, *Att'y & Sol's.*

AUSTIN, TEXAS, *January* 18*th*, 1870.

Mess'. MOORE & SHELLY, *Austin, Texas.*

369 GENTLEMEN: Your favor of yesterday is before me, requesting me to furnish you with an affidavit as to the facts communicated by me to Mr. S. A. Maverick in relation to the condition of the suit in chancery in the United States circuit court, at Austin, wherein Howard's Heirs are plaintiffs and Mr. Maverick and others are defendants. I would greatly prefer your getting such information from some other source if it could be done, but as you say it cannot, and insist upon my making the statement, I have done so as fully as I can at this late day. I have no doubt the statement I made to your Mr. Shelly, at or about the time the facts occurred were much fuller than I can now recollect them. I herewith hand you an affidavit of all the material facts as I recollect them.

Yours truly,

F. W. CHANDLER.

(Endorsed:) Filed January 18, 1870. M. Hopkins, clerk.

And afterwards, to wit, on the 24th day of January, A. D. 1870, the following statement from the land office, endorsed, "10 chancery. 2d statement from land office. Howard's Heirs vs. Maverick. Filed January 24, 1870. M. Hopkins, clerk." And is in words to wit:

2d statement from land office.—Filed January 24, 1870.

GENERAL LAND OFFICE,
Austin, January 10, 1870.

370 Statement for Russell Howard, esq., of patents cancelled by reason of conflict with the McMullen grant in Medina County.

Jeremiah Bailey	1,096	253 sq. vs.	vol. 16	No. 556	1st	class.
N. Flores	½ league	½ labor,	page 190	vol 9	"	"
" "	½ league	½ labor,	" "	" "	"	"
William Miller	640	acres	" 509	" 2	2d	"
Jean Nicholas Peltzer	640	"	" 20	" 30	3d	"
John Hupgens, dec'	253	"	" 18	" "	"	
" " "	67	"	" "	" "	"	
Theobald Deadrich	320	"	" 731	" 16	"	
" "	320	"	" 371	" 17	"	
Godfrey Mowery	330	"	" 425	" 35		
" "	320	"	" 97½	" 36		
Edward Scheinder	320	acres	No. 893	vol. 6	3	class
" "	320	"	" 894	" "	"	"
John Dihres	320	"	" 490	" 32	"	"

Berthold Barth	320	"	"	646	"	16	"	"
Antonio Quinones	320	"	"	604	"	4	"	"
Peter Friker	320	"	"	895	"	3	"	"
Philip Schuchard	640	"	"	1462	"	9	"	"
John Batol	320	"	"	247	"	12	"	"
Bowart Sohns	320	"	"	710	"	15	"	"
Nostor Mungiun	320	"	"	151	"	3	"	"
Edward Hernandes	304 2/5	"	"	588	"	12	bounty	
Geo. W. Pleasant	320	"	"	4	"	6	"	
" " "	640	"	"	19	"	1	"	
Antonio Disohn	44 2/5	"	"	282	"	33	3d class	

Very respectfully,

JOSEPH SPENCE.

371 And afterwards, to wit, 18th March, 1870, the following entry appears upon the chan'y minutes, to wit:

United States circuit court in chancery, March 18th, 1870.

MAVERICK *vs.* HOWARD'S HEIRS ET AL. } 10. Ch'y.

On petition for leave to file bill of review, or bill of that nature.

The novelty and importance of the questions involved in this application and the ability displayed by counsel in their examination and discussion, would render it proper for me to present at length, the reason for the conclusion to which my mind has been brought. But I have not the time to do so.

In my opinion the evidence entirely fails to establish any fraud or professional misconduct on the part of the complainants' solicitor in obtaining the decree, nor do I see that there was any fraud upon the jurisdiction of the court, or that there is any error of law apparent upon the record. If the court can look outside of the record of this case, with a view to open up the decrees, (which I very greatly doubt,) and determine that the complainants' title is the same one that was before the supreme court in the case of McMullen vs. Hodge, still I would be reluctant to open the decree on that ground, for the authority of that case is
372 rendered, at l'ast to some extent, doubtful by the subsequent decision in the case of Trevins vs. Fernandez.

From all the facts apparent of record and the evidence now presented on this application it seems clear to me that the failure of the def't Maverick to make a defence, or to take steps for his relief within a reasonable time after the decree was rendered, by appeal or otherwise resulted much more from his own laches and negligence than from any accident, mistake, or misfortune.

After the most careful consideration of the whole subject and of the authorities to which I have been referred, my opinion is that this application ought to be refused and costs thereof taxed to defendant; and it is so ordered.

It is further ordered that the defendant do, on or before the rule-day in April next, obey and conform to the decree of the court on the subject, to such further process as may be awarded against him.

T. H. DUVAL,
U. S. Judge.

373 UNITED STATES OF AMERICA:

Circuit court of the United States in and for the western district of Texas, 5th circuit, sitting at Austin.

Be it remembered that, at a term of the circuit court of the United States in and for the western district of Texas, sitting at Austin, for the June term, A. D. 1871, the following proceedings were had, to wit:

Entry rule-book—Notice of filing, &c.

AUSTIN, *March 31st*, 1871.

HEIRS OF BAINBRIDGE D. HOWARD *v.* ARCHIBALD D. HODGE *et* ET ALS. } No. 10. Chancery. Entry rule-book.

And now comes Hancock & West, solicitors for Branch T Masterson assignee of John H. Herndon, and M. A. Maverick, surviving wife and executrix of the last will and testament of Samuel A. Maverick, deceased, and the heirs of S. A. Maverick, by their mother M. A. Maverick, and file their petition for the revival of the above-named suit, and for appeal, and therewith their motion asking an order setting the same down for hearing, &c. M. HOPKINS, *Clerk.*

Filed and ent'd March 31, 1871.

Which petition for revivor and appeal is endorsed, to wit: "Chancery No. 10. Heirs of B. D. Howard vs. Archibald Hodge, et als. Petition for revivor & appeal. Filed March 31st, 1871. M. Hopkins, clerk;" and is in words, to wit:

374 *Petition for revivor and appeal.*

Filed March 31, 1871.

M. HOPKINS, *Clerk.*

In the circuit court of the United States for the western district of Texas, at Austin, Texas.

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } In chancery. No. 10.

To the Hon. Thomas H. Duval, judge of the district court of the United States for the western district of Texas, and ex-officio judge of the circuit court of the United States for said western district of Texas:

Branch T. Masterson, assignee in bankruptcy of the estate of John H. Herndon, and a citizen and resident of the city and county of Galveston, in the State of Texas, and Mary A. Maverick, (*deceased*,) the surviving wife of Sam'l A. Maverick, deceased, and executrix of the last will & testament of said Samuel A. Maverick, deceased, who is a citizen & resident of the city of San Antonio, in the county of Bexar, in the State of Texas, and Sam. Maverick, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, who are

the only surviving children and the only heirs-at-law of said Sam'l
375 A. Maverick, deceased, and are citizens and residents of said county of Bexar, in said State, the two last named of whom are minors, above the age of fourteen years, and appear in this proceeding by their mother and next friend, the said Mary A. Maverick, respectfully represent to your honor that, heretofore, to wit, on the 20th day of June, A. D. 1866, in the circuit court of the United States, for the western district of Texas, in chancery, sitting at Austin, at the June term, 1866, a final decree in chancery was rendered in favor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H., (formerly Howard,) his wife, Emphraim H. Lombard and Julia A., (formerly Howard,) his wife, and Mehitabel Howard, who are the heirs-at-law of Bainbridge D. Howard, deceased, complainant, against Sam'l A. Maverick and John H. Hernden, defendants, by which decree the said complainants recovered of said defendants a certain tract of land, described in said decree as follows—and that the title to the same decreed to be free from all clouds cast thereon by said defendants—viz.: to certain tract or parcel of land, on or about the 22nd day of November, A. D. 1766, granted by the government of Spain, according to the forms of laws, to the Indians of the Mission of San
376 José, and by them conveyed to John McMullen, since deceased, beginning on the top of Padron Hill; thence running from the north to the south to the creek called the Alamos, at the crossing thereof, where there was placed a land-mark, near the road leading to the presidio of the Rio Grande; thence along the road westwardly to the arroyo or creek Pahalinn, where there was placed a land-mark; thence turning towards the north to the road that comes from the cañon to the Loma Alto, where was placed a land-mark by piling stones a short distance from the land-mark of Beltazar Perez, an adjoining proprietor; thence following an east course to the said Padron Hill to the place of beginning, said tract lying in the counties of Bexar and Medina, in the State of Texas, and commonly known as the pasture-land of the Mission of San José; and by said decree certain of the matters were ordered and decreed; all of which will more fully and at large appear by said decree which is of record in your hon. court, and is here referred to and made a part of this petition.

Your petitioners further represent that, since the said final decree was rendered as aforesaid, the said John H. Herndon has been
377 declared and decreed to be a bankrupt by the United States district court in and for the eastern district of the State of Texas, sitting at Galveston, in said district, and your petitioner, Branch T. Masterson has been appointed and confirmed as the assignee of the estate of said bankrupt; and since the said final decree was rendered, as aforesaid, the said Samuel A. Maverick has departed this life, at the county of Bexar, in said State, leaving a last will & testament, by which the said Mary A. Maverick, surviving wife of said Samuel A. Maverick, was appointed the sole executor of said will & testament; that by said will & testament, the said Samuel A. Maverick, deceased, devised and bequeathed the one-half of all his estate to the said Mary A. Maverick, and the other half in equal portions to his surviving children, who are the said Sam'l Maverick, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, the two last of whom are minors over fourteen years of age, and appear in this proceeding by their mother and next friend, the said Mary A. Maverick, because they have no legal guardian.

The petitioners represent that the said last will & testament has been

duly probated and recorded in the district court of the county
378 of Bexar, in said State, and letters of executorship have been issued by said court to the said Mary A. Maverick, evidence of which she now brings into court.

Petitioners represent that said Mary A. Maverick is the surviving wife of said Sam'l A. Maverick, deceased, and said Sam., George M., Willie H., Mary B., and Albert, are the only heirs-at-law of said Sam'l A. Maverick, deceased.

Petitioner further represents that the tract of land recovered by said complainants by said final decree, is valued at and is worth more than five thousand dollars.

Your petitioner further represents that they have an interest in reviving the said final decree, as they desire to take an appeal therefrom to the Supreme Court of the United States. They therefor' pray that the said suit, which abated as to the said Samuel A. Maverick, by his death, may be revived in the name of the said Mary A. Maverick, Sam. Maverick, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, the two last appearing in this proceeding by their mother & next friend, the said Mary A. Maverick, as defendants;
379 and that said Branch T. Masterson, as assignee in bankruptcy of the estate of the said John H. Herndon, may be substituted as a defendant in the place of said John H. Herndon, and that your petitioner' may be admitted as parties defendant to said final decree, to prosecute an appeal from said decree to the Supreme Court of the United States. Petitioner' represents that they are injured and aggrieved by the said final decree rendered as aforesaid, and by the whole of the proceedings in the suit in which said decree was rendered. Wherefore they pray for an appeal to the Supreme Court of the United States from the said final decree, and from the whole of the proceedings in the suit in which the said decree was rendered, and they herewith offer to your honor a bond, according to law, to be approved by you; and they pray the allowance of said appeal, and a citation according to law.

March 31st, A. D. 1871.

HANCOCK WEST,
Sol's for Petition'.

Filed March 31st, 1871.

M. HOPKINS, *Clerk.*

380 And filed with said petition for revivor & appeal, there was filed the following motion, endorsed, "Filed March 31, 1871. M. Hopkins, clerk."

Motion for order setting down for hearing.

Filed March 31, 1871.

M. HOPKINS, *Clerk.*

In chancery.

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET ALS. } Chancery. No. 10.

And now, at this day, comes Branch T. Masterson, assignee in bankruptcy of the estate of John H. Herndon and Mary A. Maverick, sur-

viving wife and executrix of the last will and testament of said Samuel A. Maverick, deceased, and Samuel Maverick, George Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, who are the only surviving children and heirs-at-law of said Samuel Maverick, deceased, the two last named of whom are minors above the age of fourteen years, and appear in this proceeding by their mother and next friend, the said Mary A. Maverick, and moves the court that their petition for the revival of the above-named suit, and for granting an appeal in the same, may be set down for hearing on some day certain, and that all the necessary orders to that effect be entered and proof may be made.

HANCOCK & WEST,
Sol's for Petitioners.

The parties and their solicitors will take notice that this motion and application is set down for hearing for the rule-day in May, 1871.
HANCOCK & WEST, *Sol.*

381 And thereupon, on the same day, the following order to the marshal issued from the clerk's office:

Order to serve copies of petition, &c., on sol's for complainant.—Issued March 31, 1871.

U. S. circuit court, Austin.

UNITED STATES OF AMERICA,
Western District of Texas:

The President of the United States to the marshal of the western district of Texas, greeting:

You are hereby directed to serve Russell Howard, of San Antonio, Bexar Co., Texas, and W'm Alexander, and Moore & Shelly, of Austin, Travis Co., Texas, solicitors for complainants in case No. 10, chancery, entitled, Heirs of Bainbridge D. Howard vs. Archibald Hodge et al., lately pending in this court, with the accompanying copies of petition for revival & appeal and accompanying , serving each of said solicitors with a copy, and make due return showing how you have executed the same.

Witness the Hon. Salomon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court at Austin, this 31st day of March, A. D. 1871.

[SEAL.]

M. HOPKINS, *Clerk.*
E. P. PHILIPPS.

In the U. S. circuit court for the western district of Texas, at Austin

382 BAINBRIDGE D. HOWARD'S HEIRS *vs.* ARCHIBALD HODGE ET AL. } No. 10. Chancery.

Motion & petition for rev'or & appeal by Branch T. Masterson, assignee in bankruptcy of John H. Herndon, one of the def'ts, & executrix, & heirs of Samuel A. Maverick, deceased, another of the def'ts in said suit.

I accept service of the annexed notice of a motion & petition, as though the notice & copy of the same had been personally served on me by the marshal, reserving, of course, all exceptions & defences thereto.

April 8th, 1871.

RUSSELL HOWARD.
E. P. PHILIPPS.

Return of service by the marshal.

Filed April 10, 1871.

M. HOPKINS, *Clerk.*

Received in office this 31st March, 1871, served on W'm Alexander, April 1st, 1871, in obedience to the within order, by handing him, in person, a copy of the motion & accompanying petition, both certified by the clerk, under the seal of the court.

$2.00.

THOMAS F. PURNELL,
U. S. Marshall.
By ROB'T B. JOHNS, *Dep'y.*

Served Moore & Shelly, April 8th, 1871, by handing N. G. Shelly, in person, a copy of the motion and accompanying petition, certified by the clerk, under seal of the court.

$2.00.

THOMAS F. PURNELL,
U. S. Marshall.
By ROB'T B. JOHNS, *Deputy.*

Filed April 10th, 1871

M. HOPKINS, *Clerk.*
E. P. PHILIPPS.

383 And afterwards, to wit, on the 25th day of April A. D. 1871, the following notice of filing of papers by the applicants appears upon the rule or order book, to wit:

Notice to complainant's solicitors, of filing of sundry proofs in support of application for revivor and appeal.

Filed April 24, 1871.

M. HOPKINS, *Clerk.*

APRIL 25TH, 1871.

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET ALS. } Ch'y. No. 10.

In U. S. circuit court, sitting at Austin, Texas.

To the complainants and their solicitors of record in the above-entitled cause:

Take notice that there has this day been filed in said cause the following papers:

1. A certified copy of the last will and testament of Samuel A. Maverick, deceased.

2. Certified copies of letters of administration cum testamento annexo.
3. Affidavit as to heirship by John Bradley.
4. Affidavit of Mrs. E. A. M. Houston as to heirship.
5. Affidavit of G. J. Houston.

Which papers will be read on the hearing of the motion filed in said cause heretofore, and in support of the application for revivor & appeal in said suit.

HANCOCK & WEST, *Sols., &c.*

And thereupon there issued from the clerk's office on the same day, to wit, Ap'l 24, 1871, an order to the marshal to serve complainants' solicitors with copies of this notice; which order in words, to wit:

384 *Order to marshal to serve copies of notice upon complainant's solicitors.*

Issued Ap'l 24, 1871.

M. HOPKINS, *Clerk.*

UNITED STATES OF AMERICA:

Circuit court U. States, at Austin, sitting.

To the marshal of the western district of Texas, greeting:

You are hereby instructed to serve W'm Alexander, esq., & Mess. Moore & Shelly with accompanying copies of notice, filed this 24th day of April, A. D. 1871, in case Bainbridge D. Howard's Heirs vs. Archibald Hodge et al., No. 10, chancery, upon suit for revivo' & appeal; they being served with the same as solicitors of record in the foregoing entitled cause.

Witness the Hon. Salomon P. Chase, Chief Justice of the Supreme Court of the United States, and seal of court at Austin, this April 24th, 1871.

[SEAL.] M. HOPKINS, *Clerk.*

No. 10, chancery. Filed April 25th, 1871.

M. HOPKINS, *Clerk.*

BAINBRIDGE D. HOWARD'S HEIRS
vs.
ARCHIBALD HODGE ET AL.

An order to serve accompanying copies *off* W'm Alexander, esq., Mess. Moore & Shelly, sol' for comp'l. Issued April 24th, 1871.

M. HOPKINS, *Clerk.*

Marshal's return.

385 Rec'd in office, April 24, 1871; executed same day by handing to W'm Alexander, and Moore & Shelly, each a copy of accompanying notice, certified by the clerk, with the seal of the court.

T. F. PURNELL,
U. S. Marshall.
By R. B. JOHNS, *Deputy.*

Service of 2 writs, @ $2.00=$4.00.

And afterwards, to wit, at May rules, the following entry appears upon the rule-book:

Setting down for hearing at June rules.—Entered rule-day in May—1st May, 1871.

May rules, May 1st, 1871.

BAINBRIDGE D. HOWARD'S HEIRS
vs.
ARCHIBALD HODGE ET AL. } 10. Chancery.

And now come the parties to the petition for revivor and appeal, by their solicitors, Hancock & West, and the judge being absent, in attendance on the court at Tyler, the said parties, through their said solicitor, sets down said motion and petition for hearing on the rule-day in June next.

HANCOCK & WEST,
Sol's for Petitioners.

And on the same day, to wit, May 1st, 1871, at rules, the following entry appears:

Entry May rules, May 1, 1871.

BAINBRIDGE D. HOWARD'S HEIRS
vs.
ARCHIBALD HODGE ET ALS. } 10. Ch'y.

In this cause come the compl'ts therein, by their solicitors, Howard & Harrison, and file their motion to strike from the files the petition for revivor and appeal, & motion for appeal for causes assigned in said motion this day filed and entered. May 1, 1871.

M. HOPKINS, *Clerk.*

386 Which motion of complainants, filed May 1, 1871, is in words to wit:

Motion of complainants to strike from the files the petition for revivor and appeal.—Filed May 1, 1871.

In the circuit court of the United States for the western district of Texas, at Austin.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE & AL., THAT IS TO SAY, assignee in bankruptcy of John H. Herndon and devise's of Samuel A. Maverick, deceased. } In chancery. No. 10.

In this cause now come the complainants, by their solicitors, and move the court to order to be stricken from the files and dismissed at the cost of said assignee of John H. Herndon and said devise's of said Maverick, deceased, the paper purporting to be a motion & petition for revivor and appeal, filed M'ch 31st, A. D. 1871, for the following causes, to wit:

1st. Because said petition and motion are addressed to the judge of the district court, who has no jurisdiction to try said matter, and not to the circuit court of the United States.

2nd. Because said Herndon, in his petition for appeal which was filed before the expiration of five years after the final decree against said Maverick, and during the life-time of said Maverick, alleged
387 that said Maverick refused to join him in an appeal, and such was the fact; whereupon said Herndon did take his separate appeal, which has since been heard and disposed of by the Supreme Court of the United States.

3d. Because said Herndon and said Maverick were adjudged to be and were in contempt, and, being in contempt, had no right to appeal either jointly or separately.

4th. Because said Herndon has never cleared his contempt by cancelling his locations and patents and removing his certificates; nor has his assignee done so since the bankruptcy of said Herndon.

5th. Because said Maverick in his life-time, after having been attached for contempt for disobedience of the honorable court, did afterwards comply with said decree & cancel, &c., as is thereby directed, whereby he divested himself of all interest and claim in the land in suit, and hence the same did not become a part of his estate and vest in his devisees.

6th. Because the executrix of said Maverick has inventoried the certificates removed by said Maverick in his life-time from said land as certificates belonging to his estate.

388 7th. Because that, during the lifetime of said Maverick, and before the bankruptcy of said Herndon, the said Herndon and Maverick severed in their defense, as they had a right to do.

8th Because that, on the 5th day of September, A. D. 1859, judgement pro confesso was rendered by this court against said Maverick and Herndon; and another pro confesso against them on the 1st day of October, A. D. 1860; and motion for decree, filed November 5th, A. D. 1860, granted (except as to Herndon,) decree as to Maverick; another pro confesso as to Herndon was entered, on the 4th day of March, A. D. 1861, and the motion to strike the defendant Herndon's answer from the files of same date, was, on the 20th day of June, A. D. 1866, sustained, when a final decree was rendered against said Herndon, reciting that a final decree was entered against said Maverick on the 30th day of January, A. D. 1861, as in fact it was; since which time more than five years, exclusive of the period of late rebellion and war, have elapsed.

9th. Because the report of Mathew Hopkins standing master in chancery, &c., shows that costs decreed by the court against the said
389 Herndon and Maverick were unpaid, and in consequence and for other causes, the said Herndon and the said Maverick were in contempt, and this and another report were confirmed by the court on the 21st day of February, A. D. 1867.

10th. And for other causes apparent from the papers and record of said suit, and from such other papers as may be filed in support hereof before or at the hearing of this motion which is set for hearing on the third Monday in June term next, or as soon thereafter as this honorable court may order.

HOWARD & HARRISON,
Solicitors for Complainants.

Motion.

In U. S. circuit court, Austin.

BAINBRIDGE D. HOWARD'S HEIRS
vs.
ARCHIBALD HODGE ET AL. } Chancery. No. 10.

The clerk will please file docket & note on the order or rule-book this motion, this 1st day of May, A. D. 1871.

HOWARD & HARRISON,
Sol'to's for Complainants.

Filed & entered May 1st, 1871.

M. HOPKINS, *Clerk.*

390 And afterwards, to wit, on the 5th day of June, A. D. 1871, the following entry appears upon the chancery minutes of said court:

Entry setting down for hearing, June 5, 1871.

AUSTIN, TEXAS, *June 5th*, 1871.

Be it remembered that, on this day, Monday morning, June 5th, 1871, the United States circuit court in and for the western district of Texas, holding sessions at Austin, met in pursuance of law and adjournment, the Hon. Thomas H. Duval, in absence of Hon. W. B. Woods, presiding as circuit court judge. The following proceedings were had.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET ALS. } No. 10. Ch'y. On petition for revivor and appeal.

On this day came the solicitors of the applicants for revivor and appeal in this cause, Hancock & West, and the complainants' solicitors, and, upon the motions set by the applicants for hearing this day on due notice to complainants' solicitors, it is suggested by counsel, and so ordered by the court, that all the motions pending herein, be set for hearing on Thursday morning next at 10 o'clock.

And afterwards, to wit, June 9th, 1871, the following entry appears on the minutes of the court.

Entry minutes, June 9, 1871.

FRIDAY MORNING, *June 9th*, 1871.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET ALS. } Chancery. No. 10.

On petition for revivor & appeal.

391 On this day came the parties, by their solicitors, the petitioners by Hancock & West, and the respondents by Geo. F. Moore, and thereupon, *and thereupon* the cause, presented by the petition, as well as the opposition thereto, was argued, and the case presented held for consideration by the court.

And afterwards, to wit, on the 12th day of June, A. D. 1871, the following entry appears upon the minutes of the court, to wit:

392 United States circuit court sitting in chancery, at Austin, June term, A. D. 1871.

MONDAY MORNING, *June 12th*, 1871.

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } 10. In chancery.

In U. S. circuit court, sitting as a court of equity, at Austin, Texas, in the western district of Texas.

And now, at this day, in the above-entitled cause, came the following parties, to wit: Branch T. Masterson, assignee, in bankruptcy of the estate of John H. Herndon, and Mary A. Maverick, the surviving wife of Samuel A. Maverick, dec'd, and executrix of the last will & testament of said Samuel A. Maverick, deceased; and Sam. Maverick, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, the only surviving children & only heirs-at-law of the said Sam'l A. Maverick, deceased, the two last-named being minors above the age of fourteen years, and appear by their mother and next friend, the said Mary A. Maverick, to their petition for revivor and appeal, heretofore filed in said cause on the 31st of March, 1871, together with their motion for a hearing of the same, filed in said cause on 31st March, 1871, as well as the motion filed therein on the 1st of May, 1871, by the complainants in said cause, to strike said
393 petition from the files; and all of which matter had, by the court, been set down in open court for hearing for this day; and the said complainants in said cause appear in court by their said solicitors, Howard and Harrison and George F. Moore, and the said parties first above-named herein appearing also, in open court, by their solicitors, Hancock & West, the motions above-named, together with the petition for revivor and appeal, were all heard at the same time; and thereupon, in support of their application for revivor & appeal, the said parties first named, read the following papers, marked and lettered from "A" to to "I:"

1. Certified copy of last will & testament of Sam'l A. Maverick, dec'd. Endorsed as filed in this suit. Filed April 24, 1871. M. Hopkins, clerk. And letter "A."

2. Letter "B." Affidavit of Mrs. E. A. M. Houston. Endorsed: Filed April 24, 1871. M. Hopkins, clerk.

3. Letter "C." Motion to set down for hearing the petition for revivor & appeal. Filed March 31st, 1871. M. Hopkins, clerk.

4. Letter "D." Affidavit of John Bradley. Endorsed: Filed April 24, 1871. M. Hopkins, clerk.

5. Letter "E." Affidavit of G. I. Houston. End'd: Filed April 24, 1871. M. Hopkins, clerk.

6. Letter "F." Petition of compl't for attachments against Maverick, & against Branch T. Masterson, as assignee in bankruptcy of the estate of John H. Herndon. Endorsed: Filed June 12, 1869. M. Hopkins, clerk, with the orders of court thereon.

7. Letter "G." Affidavit of Sam'l A. Maverick in answer to the attachment. End's'd: Filed Oct. 4th, 1869. M. Hopkins, clerk.

8. Letter "H." Affidavit of E. M. Pease. End's'd: Filed Oct. 4, '69. M. Hopkins, clerk.

9. Letter "I." Bill of complaint & application for injunction.
394 Dep's ordered with the clerk as exhibits.

All of which papers have heretofore been filed and constitute part of the record in said cause.

Argument was then heard on behalf of both the parties in open court, and it appearing to the court that the said defendant John H. Herndon had been adjudicated a bankrupt, and that Branch T. Masterson had been duly appointed and confirmed as assignee in bankruptcy of the estate of said John H. Herndon; and it further appearing that the said Mary A Maverick is the surviving wife of the said Sam'l A. Maverick, dec'd, and executrix of the the last will & testament; and that Sam'l Maverick, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick are the only surviving children, and only heirs of the said Sam'l A. Maverick, dec'd, the two last named being minors above the age of fourteen years, and who appear by their mother & next friend, the said Mary A. Maverick; and that these parties are interested & affected by the said final decree heretofore rendered in the said cause: It is, therefor', ordered that their prayer in said petition for revival & appeal be granted, and it is accordingly ordered that the said suit which had abated by reason of the death of the said Sam'l A. Maverick, and of the bankruptcy of the said John H. Herndon, stand revived and be in the same plight and condition as it was at the date of the death of the said Sam'l A. Maverick, dec'd, and the bankruptcy of the said John H. Herndon. And it is further ordered that the said Branch T. Masterson, assignee as aforesaid, and the said Mary A. Maverick, the surviving wife of said Sam'l A. Maverick, dec'd, and executrix of the last will & testament of the said Sam'l A. Maverick, dec'd; and Sam.
Maverick, George M. Maverick, Willie H. Maverick, Mary B.
395 Maverick, and Albert Maverick, the last two of whom are minors over the age of fourteen years, and who appear by their mother and next friend, the said Mary A. Maverick, be made parties defendants to said decree; and it is further ordered that the prayer of the said parties last above named herein for an appeal in said cause be granted, and the said appeal is here allowed on the said last-named parties, or one or more of them, entering into bond in the sum of eight hundred dollars, and it is ordered that the clerk issue the usual *the usual* citations in appeal for the service on the said complainants or their said solicitors, Harrison & Howard or Geo. F. Moore, esq.

And the said exhibits read in support of said application and referred to in the foregoing order, marked and lettered from "A to I," and enumerated therein as—

Letter "A." Certified copy of the last will and testament of Samuel A. Maverick, dec'd.

Letter "B." Affidavit of Mrs. E. A. Houston.

Letter "C." Motion to set down for hearing the petition for revivor and appeal,

Letter "D." Affidavit of John Bradley.

Letter "E." Affidavit of G. J. Houston.

Letter "F." Petition of complainants for attachments against Maverick and against Branch T. Masterson, assignee in b'k'ptcy of John H. Herndon.

Letter "G." Affidavit of Samuel A. Maverick, in answer to attachment.

Letter "H." Affidavit of E. M. Pease—

Are in words to wit:

396 EXHIBIT A.—*Last will and testament of Samuel A. Maverick.*

Filed April 24, 1871.

M. HOPKINS, *Clerk.*

County court for the settlement of estates.

THE STATE OF TEXAS, *County of Bexar:*

To all persons to whom these presents shall come, greeting:

Whereas, at the October term of said court, Mary A. Maverick was duly appointed administratrix of the estate of S. A. Maverick, deceased, and hath given the bond and taken the oath required by the statute in such cases made & provided:

Now, therefore, know ye, that the said Mary A. Maverick, administrix as aforesaid, is duly authorized and empowered to take into his possession all and singular the goods & chattels, lands and tenements, rights and credits, belonging to the estate of the said deceased, and well and faithfully hold the same subject to the orders of this court; to ask, demand, sue for, recover, and receive all and whatsoever credits which to the said deceased while he lived and at the time of his death appertained; to make and exhibit a true & perfect inventory of all the property belonging to said estate, and generally to do and perform
397 all acts & things necessary to be done and performed in the due administration thereof, under the orders of this court.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the dist. court of said county, at the city of San Antonio, this 20th day of April, A. D. 1871.

M. SLOCUM,
Clerk D. C. B. Co.

S. A. Maverick's will.

Considering the dangers of travel, it is at least prudent to make, as I do this, my last will & testament and deed in fee-simple.

Of all and singular the lands and property, real, personal, or mixed, held, owned, possessed, or claimed by me in this or any other State or country, (except as hereinafter excepted,) I, Sam'l A. A. Maverick, do hereby devise, give, and grant, in fee-simple, the one moiety or half to my wife Mary A., and the other half in equal shares to my living children, Sam., George M., Willie H., Mary B., and Albert; and if my wife should die before I do, or either of said children, without leaving wife or
398 child living at my death, then the survivors to have the property according to the above disposition; all the property not distributed at my said wife's death is to go towards equalizing each child's share. So long as Mary A. finds it convenient, I wish her to exercise ownership and chief control of the administration, without her giving any bonds whatever or being bound to account to any court, but merely having this my will put upon the records of deeds, &c., in Bexar Co., and anywhere else she pleases, and all transfers made by my said wife to the children or to any other persons, by way of bargain and sale, shall be good and effectual, without the orders or intervention of any court or authority.

Said Mary A. can, if she pleases, associate with her, permanently or from time to time any of the said children in the administration of this estate. In case of my said wife's death, any one or more of said children

may go on with the administration as my executor or administration of this will upon putting on record in Bexar Co. a little agreement of all the surviving children; and to this end, the minors, Mary B. and Albert, shall have the same effect and power to sign and act as those of full age. (And here I will add, that I consider the said minors do
399 not require to have any legally-appointed or other guardians than their mother's natural protection.) And such child or children as shall carry on the administration of this will shall be excused and saved from the inconvenience of giving bonds for faithful performance, provided no one of the other children shall demand in writing that such bonds be given. I hereby except out of the bulk of my estate the house and lot at the northwest corner of the Plaza, by the Sequia, given to my daughter-in-law Ada (Bradley) Maverick and such other property as said Mary A. may think proper to convey to her.

This paper is written hastily, but after a life-long determination as to its main features. And I hereby revoke a similar disposition (and all other wills up to this date.) San Antonio, twenty-ninth day of October, eighteen hundred and sixty-nine.

The chief use of this will be to save my executors from going into bonds in the probate court with a long-winded inventory and so forth.

SAM'L A. MAVERICK.

At the request of S. A. Maverick, who says that the foregoing is his last will and testament, we subscribe as witnesses to his signa-
400 ture, all present and seeing each sign at the same time.

FRANK. REICHBERGER.
THEODORE BALDUS.
JUAN E. BARRERA.

THE STATE OF TEXAS, *County of Bexar:*

Personally appeared before me, the undersigned authority, Frank Reichberger, Theodore Baldus, and Juan E. Barrera, all to me well known, who, being by me duly sworn, on their oath do say that Sam'l A. Maverick declared to them that he signed the foregoing instrument of writing, and that he declared the same to be his last will & testament; that they signed the same as witnesses, at the request of the said Maverick, in his presence and the presence of each other.

To certify which I hereunto set my hand and affix the impress of my official seal, at office in San Antonio, this 30th day of October, 1869.

[L. S.] PEYTON SMYTHE, *C. P. B. C.*
By H. McCORMACK, *Deputy.*

401 District court for the settlement of estates, &c., October term, 1870.

THE STATE OF TEXAS, *County of Bexar:*

ESTATE OF SAMUEL A. MAVERICK, DEC'D. } No. 921.

Proof of last will & testament of Sam'l A. Maverick, deceased.

This day personally appeared in open court Theo. Baldus, who, being duly sworn as a witness in the above-entitled matter, and examined in behalf of the applicant, to prove said will, say': I was well acquainted with Sam'l A. Maverick, dec'd, during his life-time. I knew the above

decendent for about ten years before his death. The signature of said deceased to the instrument now shown to me, and offered for probate as his last will and testament, and bearing date of October 29th, in the year A. D. 1869, was made by the deceased, at San Antonio, & county aforesaid, in presence of myself, Frank Reichberger, and Juan E. Barrera, the other subscribing witness', all of said witnesses being over the age of fourteen years. At the time of the making of said will the testator was of sound and disposing mind and memory, and he declared the said will so made by him to be his last will & testament, and
402 I thereupon signed my name as a witness, together with Frank Reichberger and Juan E. Barrera, at the request of the said testator, in his presence and in the presence of each other. The said deceased, at the time of the executing of said instrument, was about sixty-six years of age. The said S. A. Maverick departed this life on the 2nd day of September, A. D. 1870, about ten months after making said will.

THEODORE BALDUS.

Sworn to & subscribed before me this 4th day of October, A. D. 1870.

M. SLOCUM,
Clk D. C. B. C.

District court for the settlement of estates, &c., October term, 1870.

THE STATE OF TEXAS, *County of Bexar:*

ESTATE OF SAM'L A. MAVERICK, DEC'D. } No. 921.

Proof of last will & testament of Sam'l A. Maverick, dec'd.

This day personally appeared in open court Juan E. Barrera, who, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the applicant, to prove said will, say': I was well acquainted with Sam'l A. Maverick, dec'd, during his life-time. I
403 knew the above descendent for about ten years before his death. The signature of said deceased to the instrument now shown to me and offered for probate as his last will & testament, and bearing date of October 29th, in the year A. D. 1869, was made by the deceased, at San Antonio, Texas, in presence of myself, Frank Reichberger and Theodore Baldus, the other subscribing witnesses, all of said witnesses being over the age of fourteen years. At the time of the making of said will the testator was of sound and disposing mind and memory; he declared the said will so made by him to be his last will & testament, and I thereupon signed my name as a witness, together with Frank Reichberger and Theodore Baldus, at the request of the said testator in his presence, and in the presence of each other. The said deceased, at the time of the executing of said instrument, was seventy years of age. The said S. A. Maverick departed this life on the 2nd day of September, A. D. 1870, about ten months after making said will.

JUAN E. BARRERA.

Sworn to & subscribed before me this 4th day of October, A. D. 1870.

M. SLOCUM,
Clk D. C. B. C.

THE STATE OF TEXAS,
County of Bexar:

I hereby certify the above and foregoing to be a true & correct
404 copy of the original last will & testament of Sam'l A. Maverick, deceased, now on file in my office.

Witness M. Slocum, clerk of the district court of said county and seal of said court, at office, in San Antonio, this day of April, 1871.

Cl'k Dist. Court, Bexar Co.

1 & 2 filed April 24, 1871.

M. HOPKINS, *Clerk.*

405 EXHIBIT "B."—*Affidavit of Mrs. E. A. M. Houston.*

Filed April 24, 1871.

M. HOPKINS, *Clerk.*

STATE OF TEXAS, *County of Bexar:*

Personally appeared before me, the undersigned authority, Mrs. E. A. M. Houston, a resident of the city of San Antonio County, and State aforesaid, to me personally well known, who, on oath, declares that she is over 40 years of age, and has been intimately acquainted with the late Sam'l A. Maverick and his family during the last 30 years. Affiant further declares that, from intimacy and long acquaintance with said family, she is competent to state positively that the heirs of the late Sam'l A. Maverick are the following-named persons, and no others, to wit:

Mrs. Mary A. Maverick, surviving wife of deceased, Sam'l, Geo. M., Willie H., Mary B., and Albert. The three first-named sons are over 21 years of age; the last two-named heirs are minors, all being residents of San Antonio, Texas. Mary B. Maverick is 19 years of age, and Albert is 16 years of age.

E. A. M. HOUSTON.

Sworn to & subscribed before me, A. L. McLane, this 20th day of April, A. D. 1871.

U. S. Com'iss W. D. Texas.

406 In chancery. No. 10.

EXHIBIT "C."—*Motion to set down for hearing the petition for revivor & appeal.*

Filed March 31, 1871.

M. HOPKINS, *Clerk.*

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } No. 10.

And now, at this day, comes Branch T. Masterson, assignee in bankruptcy of the estate of John H. Herndon, & Mary A. Maverick, surviving wife & executrix of the last will & testament of said Sam'l A. Maverick, deceased, & Sam'l Maverick, George Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, who are the only surviving

children of and heirs-at-law of said Sam'l Maverick, deceased, the two last-named of whom are minors, above the age of fourteen years, and appear in this proceeding by their mother & next friend, the said Mary A. Maverick, and moves the court that their petition for the revival of the above-named suit, & for p'os't'g an appeal in the same may be set down for hearing on some day certain, & that all the necessary orders to that effect be entered, & proofs may be made.

HANCOCK & WEST,
Sol's for Petit'r.

407 The parties to sol's will take notice that this motion & application is set down for hearing for the rule-day in May, 1871.

HANCOCK & WEST, *Sol's.*

NOTE.—The clerk will at once enter this motion, & make out three certified copies of this motion and the accompanying petition, & have one copy served without delay on Russell Howard, who appears from the files of said cause to be a party of interest & att'y-in-fact for the other complainants; one copy to Mess. Moore & Shelly, & one copy for Mr. William Alexander, the said Moore & Shelly, & Mr. William Alexander being the solicitors of record for said complainants.

HANCOCK & WEST, *Sol's.*

Filed M'ch 31st, 1871.

M. HOPKINS, *Clerk.*

408 EXHIBIT "D."—*Affidavit of John Bradley.*

Filed Ap'l 24, 1871.

M. HOPKINS, *Clerk.*

STATE OF TEXAS, *County of Bexar:*

Personally appeared before me, the undersigned authority, John Bradley, a resident of the city of San Antonio, county and State aforesaid, to me personally well known, who, on oath, declared that he is over 21 years of age, and has been, during that time, intimately acquainted with the late Sam'l A. Maverick and his family during the last 25 years. Affiant further declares, from intimacy and long acquaintance with said family, he is competent to state positively that the heirs of the late Sam'l A. Maverick are the following-named persons, and no others, to wit: Mrs. Mary A. Maverick, surviving wife of deceased, Sam., George M., Willie H., Mary B., and Albert. The three first-named sons are over 21 years of age; the last two named heirs are minors, all being residents of San Antonio, Texas. Mary B. Maverick is 19 years of age, and Albert Maverick 16 years of age.

JOHN BRADLEY.

Sworn to & subscribed before me this 20th day of April, A. D. 1871.
[L. S.]
A. L. McLANE,
U. S. Commissioner, W. D. Tex.

409 EXHIBIT "E."—*Affidavit of G. J. Houston.*

Filed April 24, 1871.

M. HOPKINS, *Clerk.*

STATE OF TEXAS, *County of Bexar:*

Personally appeared before me, the undersigned authority, Dr. G. J. Houston, a resident of the city of San Antonio, county & State aforesaid, to me personally well known, who, on oath, declares that he is over 45 years of age, and has been, during that time, intimately acquainted with the late Sam'l A. Maverick and his family during the last 35 years. Affiant further declares, from intimacy and long acquaintance with said family, he is competent to state positively that the heirs of the late Sam'l A. Maverick are the following-named persons, and no others, to wit: Mrs. Mary A. Maverick, surviving wife of deceased, Sam., George M., Willie H., Mary B., and Albert. The three first-named sons are over 21 years of age; the last two named heirs are minors, all being residents of San Antonio, Texas. Mary B. Maverick is 19 years of age, and Albert Maverick is 16 years of age.

G. J. HOUSTON.

Sworn to & subscribed before me this 20th day of April, A. D. 1871.

A. L. McLANE,
U. S. Commissioner, W. D. Tex.

410 EXHIBIT F.—*Petition of complainant for attachment against Maverick & against Branch T. Masterson, assignee in bankruptcy of Jno. H. Herndon.*

Filed June 12, 1869.

M. HOPKINS, *Clerk.*

In the circuit court of the U. S. for the western district Texas, Austin.

BETWEEN B. D. HOWARD'S HEIRS, COMPLAINANTS, *and* ARCHIBALD HODGE ET ALS., DEFENDANTS. } In chancery. No. 10.

To the hon. the circuit judges of the United States for the western district of Texas, at Austin, sitting in equity:

The petition of Russell Howard, one of the complainants in the above entitled suit, who appears in his own right, and as the representative of the interests of his co-complainants, who, with himself, are the co-heirs of Bainbridge D. Howard, deceased, humbly complaining of Samuel A. Maverick & Branch T. Masterson, assignee of John H. Herndon, a bankrupt, said Maverick and Herndon being defendants in said suit, and said Masterson, assignee as aforesaid, now being at Galveston, in the State of Texas, respectfully showeth:

That the foregoing allegations are true and that the complainants in said suit did, on the 20th day of June, 1866, on a final hearing, obtain a final decree therein against said named defendants Maverick and Herndon; to which final decree, together with the subsequent orders made to give precision and effect thereto, reference is hereby made.

Petitioner further states that, after execution had been issued on said final decree for costs, and not before said costs were paid
411 by said defendants, but he distinctly states, that the said defendants Maverick & Herndon, though duly notified that they ought so to do, have 'holly failed to do the specific acts which they were directed to do in and by said decree, &c., and that, although duly notified by the

terms of said decree & as well as otherwise, they will continue to fail so to do in contempt of the authority of this honorable court.

Petitioner further states that divers other persons who title or claim under or through said Maverick and Herndon pending, and with construction notice of said suit, or since, & with constructive notice of said decree, have refused and failed, and continued to refuse & fail, to do the specific acts they are required to do by said decree, by which they are equally bound to the extent of their respective claims with said named defendants; whereby they also are in contempt of this honorable court.

Petition states that the following named are the persons referred to, viz: Herman Hühner, Mathias Baker, John Loesberg, Martin Schmidt, Joseph Sharp, Louis Huth, Joseph Frey, John Lohr, A. J. Keietsegeka, Louis Graff, Jacob Droitcourt, Joseph Meyer, Jacob Scherer, Christian Santleben, the heirs of Leonard Hans, Mathias Youngman, Jacob & Magdalena Bippert, citizen of Bexar Co., and Gerhard Inken, Joseph Bader, William Winnan, citizen of County, and that there
412 are others so doing whose names to your petitioner are unknown but which, *were* discovered, he craves leave to insert herein by amendment, to the end that they may be proceeded against as with the persons herein named.

Petitioner further states that he has had said decree duly recorded in the counties where the land lies.

Petitioner further states that, since the payment of the costs aforesaid, said Herndon has become a bankrupt; that the proceedings in his bankruptcy are pending in the district court of the United States for the eastern district of Texas, at Galveston; that Branch T. Masterson *in* his official assignee, and that said Masterson, in utter disregard of said decree, and after due notice which is ap'ended hereto and referred to as a part thereof, has advertised for sale as a part of the estate of said Herndon and continues to advertise for sale divers tracts of lands embraced in said decree, as may be seen on reference to said decree, to the printed advertisement of said assignee, a copy of which is hereto ap'ended and is referred to as a part hereof, and has thereby committed and still continues to commit a contempt of this honorable court.

Petitioner, in view of the premises, inasmuch as more than a reasonable time has elapsed for the performance of the specific acts directed to be done by said decree, refers to his affidavit filed herewith as a part hereof, and prays the court to enter an order
413 herein for the enforcement of said decree, decreeing that attachments do issue against said Maverick and said Masterson, as assignee; and all persons holding or claiming under said Maverick & said Herndon who acquired their claim since the inception of said suit, returnable to some day of this June term, such attachments to be endorsed as follows: The within-named parties to be attached & when arrested can only be released from custody on payment of the costs of attachment and on executing in duplicate a release and power of att'y to petitioners authorizing him, or such person or persons as he may institute, to do the specific act ordered to be done by said decree; the actual costs, the release and power of att'ys of the cancellation of patents, &c., to be paid by said S. A. Maverick and Masterson, as assignee, and by those holding as aforesaid under said Maverick & Herndon, together with costs of this proceeding to enforce said decree as taxed by the clerk.

RUSSELL HOWARD.

I, Russell Howard, hereinafter styled affiant, being first duly sworn, do make oath and say: That affiant is one of the complainants in chancery suit No. 10, entitled Bainbridge D. Howard's Heirs vs. Hodge et als., in the circuit court of the United States for the western district of Texas, and has, by means of various instruments, the con-
414 trol of the title and interests in the tract of land described in the final decree in said suit of each of his co-heirs, besides being their legal counsel touching the same.

Affiant futher states that the defendants Samuel A. Maverick and John H. Herndon, as well as the persons named as holding under them, pendente lite, in the petition for the enforcement of said decree to which this affidavit is attached, although they have had due notice of said decree, and the reasonable time indicated by the terms of said decree has long since elapsed, have wholly failed to comply with the same, & have thereby committed and continue to commit a persistent contempt of this honorable court.

Affiant further states that he has caused actual notice, as appears from a copy of said notice with the affidavit of service endorsed , of said decree so to be served upon Branch T. Masterson, assignee of said Herndon, and that assignee has failed and still fails to comply therewith, & has thereby committed and persists in committing a contempt of this honorable court.

Affiant further states that said assignee still persists in advertising certain tracts of land adjudicated in favor of complainant in said decree as the property of the estate of said Herndon, as a bankrupt, as appears by one of the printed advertisements hereto attached as a part
415 thereof, and that he fears that if said assignee be not restrained by means of the order now sought he will commit a further contempt of this honorable court, & will seriously embarrass and cloud the title represented by affiant.

Affiant further states that the allegations in the petition to which this affidavit is attached, is, so far as made from his own knowledge, are true; and, in so far as they are made from information derived from others, he believes them to be true.

And further affiant sayeth not.

RUSSELL HOWARD.

Sworn to & subscribed defore me this 9th day of Jane, A. D. 1869.

T. H. DUVAL,
U. S. Judge.

416 [From Flake's Daily Bulletin of June 4th, 1869.]

Assignee's sale.

200,000 acres of valuable land.

In obedience to an order issued by the Hon. Jesse Stancel, register in bankruptcy for the district court of the United States for the eastern district of Texas, in the matter of John H. Herndon, bankrupt, No. 383, I will sell at public auction in front of the door of the United States court-rooms in the city of Galveston, to the highest bidder, for cash in U. S. currency, commencing on the 5th day of July, 1869, and continuing till the property is disposed of, the following described property, viz:

1,226 acres, of land in Bosque Co., granted to James Hughes.
640 acres of land in Bosque Co., granted to Hugh Miller.
320 acres of land in Bosque Co " " " "

773 " " " " " " " to L. M. Armstrong.
330 " " " " Erath " " to I. A. Lancaster.
525 acres of " " Coryell " " to W. Thompson.
531 " " " " " " " to James Craft.
Undivided half of 1,280 acres in Falls Co., granted to J. H. Walker.
853 ac. of land " " Co., " " James G. Gay.
1,476 " " " Guadelupe Co., granted to J. M. Thompson.
1050 acres of land in Guadelupe Co., granted to C. Rector.
644⅓ acres of land in Guadelupe Co., " " Guadelupe Tores
960 acres of land in Bandera Co., granted to A. Kelly.
738 in Bandera County, granted to M. Gertrude de los Santos.
106 acres of land in Bandera Co., granted to J. L. Truehart.
216 acres of land in " " " " W. Winans.
106 acres of land in Bandera Co., granted to W. Winans.
417 1,000 " " " " Bexar " " " A. Stafford.
738 " " " " Medina " " " W. G. Still.
123 " out of the one-third league " to W. Kiggins, in Medina Co.
800 acres in Medina Co., granted to A. L. Kuykendall.
3,645 ac. in " " " " Jas. Cammel, on the McMullen grant.
2,291 acres in Medina County, granted to J. Foster, on the McMullen grant.
100 acres in Bexar Co., granted to John Sharp, on the McMullen grant.
700 in Bexar Co., granted to Jane E. Calder, on the McMullen grant.
100 acres in Bexar Co., to Jane E. Calder, on the McMullen grant.
4,228 acres in Bexar Co., granted to Jesse Thompson, on the McMullen grant.
872½ acres in Bexar Co., granted to A. T. Neal.
976 " " " " " " Jno. Barrett.

The above-described tracts of land will be sold subject to all encumberances that may exist thereon. I will also sell two hundred and forty-five (245) other tracts of land containing from 106 to 4605, acres, each, making in the aggregate more than one hundred and seventy-five thousand acres. The encumbered portion of this property will be sold to satisfy the liens, and unincumbered tracts will be sold for the benefit of the creditors.

The land is located in the counties of Fort Bend, Bosque, Hood,
418 Guadelupe, Medina, La Salle, Lampassas, Brown, Callahan, Uvalde, Zavala, Bandera, Harris, Comal, Blanco, Kerr. Gillespie, Grimes, Madison, Wood, Jack, Comanche, Caldwell, Calhoun, Coryell, Limestone, San Patricio, Karnes, Red River, Wilson, Attascoosa, Goliad, Coleman, Taylor, Jones, Bexar, Runnels, Falls, Trio, Kimbal, Shakelford, Mason, McCulloch, Concho, San Saba, Milan, and Harrison.

Also, the following lots in the town of Richmond, Fort Bend County, which will be sold to satisfy all liens existing thereon, viz: Lots No. 1, 2, 3, 4, 5, 6, 7, and 12, in block No. 53; lots No. 1 to 14, in block No. 84; lots from No. 14, inclusive in block No. 103; lots from No. 1 to 14, inclusive, in block No. 104; fractional lots No. 3 & 4 in block No. 106; lots No. 8, 9, 10, & 11, in block No. 113; lots No. 6, & 7, in block No. 114; lots No. 6, & 7, and fractional lots No. 1, 2, & 3, in block No. 117; lots No. 5, 6, 7, 12, 13, & 14, and parts No. 8, 9, & 10, and improvements in block No. 119; lots No. 3, 4, & 12, in block No. 122; lots from No. 4, to 14, inclusive, in block No. 125; lot No. 12, in block No. 133; lots No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, & 14, in block No. 126; lots No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, & 14, in block No. 13; lots No.

1, 2, 3, 4, 5, 6, 7, in block No. 136; lots No. 6, 7, & 14, in block No. 140, lots No. 1 & 2, in block No. 146; lots No. 1 & 8, in block No. 116; lot No. 5, in block No. 122; lots No. 3, & 7, in block No. 128; lot No.
419 2, in block No. 129; lots No. 1 & 2, in block No. 136; lot No. 4, in block No. 139.

Also, all notes, accounts, and evidences of debt belonging to said bankrupt's estate. A list of said notes, etc., and a schedule of the lands can be seen at any time before the day of sale at the law office of Harris & Masterson, Galveston, Texas.

The cost of revenue stamps and executing the deeds will be at the expense of the purchasers.

BRANCH T. MASTERSON,
Assignee.

F. R. LUBBOCK, *Auctioneer.*

In the circuit court of the U. S. western district of Texas, at Austin.

BETWEEN THE HEIRS OF BAINBRIDGE D. Howard, deceased, complainants, *and* ARCHIBALD HODGE ET AL., DEFENDANTS. } In chancery. No. 10.

To Branch T. Masterson, assignee of the estate of John H. Herndon, bankrupt, and to all persons interested in said estate which is now pending in bankruptcy, in the district court of the United States for the eastern district of Texas at Galveston.

GENTLEMEN: You will please take notice that, by a final decree in the above entitled & numbered suit, said John H. Herndon and
420 the other defendants thereto were directed to cause such patents and locations as they had or claimed, that were located within the limits of the large track known as the San Lucas, or pasture *of* lands of San José grant, & marked on the county maps of Bexar and Medina counties as the John McMullen tract, to be cancelled and removed, so as not to cloud the title of the heirs of Bainbridge D. Howard, deceased, to said grant, which was adjudged to be a good title. And that since the rendition of said decree said Herndon, without first complying therewith, has gone into bankruptcy, said decree being unreversed, unsatisfied, and in full force, as appears from the records of the court first above mentioned, which are hereby referred to; an original copy of said decree being on file in the general land office, and said decree being of record in Bexar & Medina Co., in the State of Texas, of which you will also take notice. Now, therefore, you and each of you are notified not to claim, advertise, sell, or purchase any of the several tracts of land marked and described in said decree, and that you and each of you are hereby called upon to comply, as soon as may be practicable, with the terms of said decree, so that the land-certificates improperly lo-
420½ cated on said grant may be removed therefrom, and sold as the property of said estate. You and each of you are further notified that if the terms of said decree, so far as the same relate to said Herndon, are not promptly complied with, and the patents and locations therein described and which were owned or claimed by him at the time service was had upon him in said suit, or as were in any manner acquired by him since, are not cancelled and removed as is therein ordered, application founded on this notice will be made during the next term thereof, or as soon thereafter as may be practicable, to the honorable the circuit court above-mentioned, for a rule against the assignee afore-

said, to show cause, if any he can, why he shall not be attached for contempt, for failing to comply with said decree and with this notice, and for such other orders as the nature of the case may require, in accordance with the practice of courts of equity.

HOWARD AND R. A. ALEXANDER,
For Compl.

10. Heirs of B. D. Howard vs. Archibald Hodge et al. in chancery, No. 10.

Filed June 12th, '69.

M. HOPKINS, *Clerk.*

421 UNITED STATES OF AMERICA,
Eastern District of Texas:

Appeared before the undersigned United States commissioners Simon Messissia, who makes oath that he delivered a copy of the within notice to Branch T. Masterson, esq., on the 1st day of June, 1869, at his office in the city of Galveston; that said Masterson read the same in his presence and compared it with the within; but declared to enter herein a written acknowledgement of service or notice of the contents thereof.

SIMON MUSSINA.

Subscribed & sworn to before me this 3d day of June, A. D. 1869.

OBER J. LABATT,
U. S. Commissioner for the Eastern District of Texas.

422 EXHIBIT "G."—*Affidavit of Samuel A. Maverick, in answer to the attachment.*

Filed Oct. 4, 1869.

M. HOPKINS, *Clerk.*

In the circuit court of the United States for the western district of Texas, at Austin.

THE HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE & ALS. } No. 10. In chancery.

In the above-entitled & numbered cause the said defendant Samuel A. Maverick, who has been attached on the charge of contempt of this honorable court, on oath states that he has not intentionally or willfully been, or in any manner acting, in contempt of the authority of this honorable court, its authority, or decree; and this respondent herein begs leave to refer to and have considered as part hereof his statement, informally *small*, in response to the rule nisi served on him, and returnable to the rule-day of this hon. court of August last past or the Saturday preceeding said rule-day, and again here now reiterates and states that, being well stricken in years, and suffering for several months previous to the service of said rule nisi from ill health, so much so as to have been much of the time confined to his bed, he was greatly thereby prostrated, both mentally
423 and physically, of properly attending to important & complicated business. as he, this respondent, regards this duty now devolved upon him. Wherefore he humbly asks that, for said reason, he may be exhonorated, in the mind of this hon. court, from any contempt, by reason of his failure and inability as aforesaid to respond to

said rule nisi further than he does as aforesaid. And this respondent further begs leave to represent & show, in response to the attachment under which he has been seized and is now held, issuing out of and under the order of this honorable court, what it is not true, as by Russel & Howard, esq., is stated in his affidavit filed herein on the 2nd of August, 1869, that he, this respondent, abandoned or forebore making any further defence in said suit; or that he withdrew his counsel, E. M. Pease, esq., from the defence of the same; or that he, this respondent, alleged that the title of complainants was superior to his, and that complainants ought in equity to have a decree against him, this respondent; or use any words or declarations of like import or meaning; nor is it true, as alleged by said defiant in his said affidavit, that he, this respondent, has repeatedly and publicately, or, in fact, on any occasion, either
424 public or private, stated that he did not intend to appeal from or resist the decrees and orders had against him in this suit; nor is it true that this respondent was applied to by said John H. Herndon to join him in an attempt at an appeal of this suit, there being no intimacy, complicity, or joint action between said Hearndon and this respondent. And further, this respondent denies that it is true, as stated by said affiant in his said affidavit, that he, respondent, in any sense, as member of the legislature of the State of Texas, procured the passage of the act referred to by him for any such thought or purpose as that attributed to him by said affiant, if, in point of fact, he voted for its passage at all, which he does not recollect; but if he did it, it was solely for the purpose, as he then believed, of promoting the public good, and with no purpose or intention on the part of this respondent to defeat affiant's rights or anyone else; nor does he now perceive, after having examined said law for the first time, that it was contrived to defeat said complainant's rights, or that a citizen of another State than Texas would be robbed of his rights by the citizens of Texas under its provisions. And this
425 respondent further says that the pretended conversations, as stated by said affiant Howard, between him, respondent, and complainant's solicitor, are partial & prejudiced rehearsals of political conversations, controversies, and arguments had between respondent and solicitor, having no reference or thought on the part of respondent to this suit, but wholly relating to the secession madeness of the day. And the insinuation by said affiant to the contrary, as *near* as the alleged conspiracy with said Herndon to defend Texas against the United States Government, is a gross slander on respondent, and if not with the design of exciting a feeling of prejudice against respondent in the mind of this honorable court, (which he does not, by any means, fear,) he, respondent, regards as totally irrelavent to the matter before the court, and as such this respondent does not deem it incumbent on him to further respond to that part of the affidavit of said Howard. And this respondent further states and shows to this honorable court that, in the spring of the year 1860, and previous thereto, there was the most friendly, and, on the part of respondent, the most cordial attachment between him and said William Alexander, esq'r., the solicitor for complainants, to whom he made
426 friendly visits. During which time, to wit, in the spring or summer of 1860, he, said solicitor, informed respondent that he had been charged with a message to him, from his, respondents' solicitor, said E. M. Pease, esq., to the effect that he, said Pease, would certainly be back to Austin from a trip taken north, in time to try the suit, meaning this suit, at, as respondent thinks, *at* the next term of the court. And at the same time, said Alexander, as respondent's pretended friend, persuaded him that it would be for his interest, in order to get rid of old

and former orders and actions in the case, to sign with him a simple agreement to be ready, as affiant thinks, for trial at the next term; whereupon, trusting to and relying on the professed friendship of said Alexander, and the reiterated assurance that his, respondent's, solicitor, would certainly be back in time to attend to his interest in said suit, he did sign the agreement of date of the 20th day of June, 1860, under the impression and believe at the time, that it was, as said Alexander represented to him, that it was merely an agreement for trial at the next term of the court, conformable to and consistent with the friendly relation and understanding between said Alexander and respondent's said solicitor, and believing that no order would be had or action
427 taken to his prejddice in the suit without *one* notice given to his said solicitor, and opportunity allowed him to set up & make defence to said suit, from respondent' information of the existence of an agreement between him, the said Alexander, and said E. M. Pease, esq'r, as this respondent's solicitor, in regard to the management and conduct of the defence of said suit for and on behalf of this respondent, which agreement will more clearly and satisfactor'ly appear from the affidavit of said Pease herewith exhibited of date the 2nd of October, 1869, and asked to be taken and considered as a part hereof. But respondent begs leave here to ask in relation of that part of said *west* referred to affidavit, where said E. M. Pease, esq'r, says, I at once notified Mr. Maverick that, as he had made an agreement with the opposing counsel in regard to his case without giving me notice, I should not hold myself responsible for its management after the date of the agreement, and that I would have nothing further to do with the cause; that while he does not mean to doubt or question the truth or sincerity of their part of said affidavit, the truth is that the respondent never received any notice from his said counsel, Pease, that he had withdrawn from his
428 defence in said suit, and if any such notice was written to him, as he supposes from said recited statement must have been the case, the same did not reach him, nor did respondent ever have any conversation on the subject with the said Pease until within the last ten or fifteen days, when respondent learned for the first time the reason assigned by said Pease why he had not attended to the defence of said suit for him, respondent, which was the same as that set out by said Pease in his said affidavit. And for the first time in said last referred to conversation he learned of the existence of the agreement between his said counsel & said Alexander, with reference to the conduct and management of his said defence, this respondent not having been at any time before informed of the existence of said agreement, nor as before stated, did said Alexander, as respondent submits, in fairness & good conscience, he was bound to have done, when he induced respondent, in manner and form as hereinbefore stated, to sign said agreement of the 20th of June, 1860, which respondent says he would not have done but for the artifice so practiced on him by said Alexander
429 and his, respondent's, ignorance of the existence of said agreement with said Pease. And respondent further states and shows that, being in said city of Austin, about the month of January or February, 1861, he thinks it was, and probably pending the secession conversation, and having heard that said Alexander had taken some sort of order or judgement by default in said suit against him, he, respondent, met said Alexander on the steps of the capitol in said city, and appealed to his sense of justice and propriety, reminding him that said agreement, meaning that of the 20th of June, 1860, was signed in confidence, and on his representations and friendly message from Gov.

Pease, said respondent maintaining that it should not be taken advantage of to the injury and prejudice of him, respondent, in the absence or want of knowledge of his said counsel, Gov. Pease—this respondent supposing at the time that the action complained of had been taken by said Alexander before Gov. Pease returned from his trip to the north, but in point of fact, seems to have occurred subsequent to his return, but without any notice to him, respondent, or his said
430 solicitor, as he in fairness and good conscious was, as hereinbefore stated, entitled to have had from said Alexander—when he said Alexander, seemed touched by the appeal thus made to him by the respondent, and thereupon replied to respondent that, "I will do nothing further in the case until I see you again," or word' to that effect, meaning, as respondent understood, that he would take no further action whatever in said suit till after he, respondent, and said Alexander should confer together and have an understanding with the reference to the progress and conduct of said suit. Respondent says at the time of the said conversation so occurring on the capitol steps with said Alexander, the time of which he cannot more specifically state, but is satisfied it was in the month of January or February, of 1861, he does not understand that any final order or judgment had been taken against him in said suit, nor was it so treated or spoken *off* by said Alexander; but, on the contrary, the impression was made on respondent's mind, as said Alexander well knew at the time, that the action of the court was only inconclusive and interlocutory in its character, the vacating or setting aside of which might be readily obtained respondent
431 allowed to answer and set up his rights and defence to said suit. And this respondent further says, that said Alexander, from the tenor and character of said conversation, well knew and understood that he, respondent, trusted to and relied on him not to take any step whatever in said suit until he would see respondent again with reference to the same. But respondent says, as appears from the records of this honorable court, said complainants allege & claim that a judgement final by default was taken in this case against him in the honorable district court of the United States at Austin, sitting in chancery on the 20th day of January, A. D. 1861, which, if already taken at the time of said conversation and promise as aforesaid of said Alexander, was subtl*elly*, artfully, and deceitfully concealed by him from this respondent, and, if taken subsequent to said conversation, must have been done a very short time thereafter, and in flagrant disregard of the promises and assurances so as aforesaid made by said Alexander to this respondent, he, said Alexander, at no time after said conversation & said promise & assurance having had any conference or conversation with respondent on
432 the subject of said suit, or given him notice of any kind whatever in relation to the same till the service as aforesaid of said rule nisi, nor in fact did this respondent have any actual notice or knowledge of the rendition of what complainants set up and claim as a final judgement and decree of this suit against this respondent, and his co-defendant Herndon, of date of the 20th of June, A. D. 1866, till long after the same, as appears by the date thereof, was taken, had, and rendered to wit, as respondent recollects probably till the month of June or July of the year A. D. 1868. And here respondent begs leave to state and call to *his* attention of the court that, at the date of said pretended decree against him of the 20th of January, 1861, the country was on the eve of a great insurrection and revolution that very soon thereafter led to the terrible war between the State of Texas and other Southern States, and the remaining States of the United States,

resulting in almost a total suspension of all such business as this suit; and the honorable court itself, in which the suit was pending, was, for a long time, probably five or more years next immediately succ-
433 ceeding said 20th of January, 1861, *was* suspended in all its powers and functions as a judicial tribunal, in so much and so completely that, during all said time, no order, process, or session of said court was taken, issued, or held. And further, that the personal & social relations of party's, citizens of the same State and section, in some instances were long suspended, which, to a very great extent, was unfortunately the state of feeling between said Alexander and this respondent; and, also, this respondent's said counsel, said E. M. Pease, esq'r, and himself, insomuch & to so great an extent that respondent recollects no correspondence during all said time with either of them further than of a mere casual and transient character. And respondent says that, being misled and deceived by the agreements and conversations, with the promises and assurances of said Alexander, as hereinbefore stated, w'ether designed or not by said Alexander to mislead him, and thro*ugh* him off his guard, such was the effect thereof, in consequence thereof, and from that cause only, and the consequent influence had th'r'by on his said counsel, E. M. Pease, esq'r, of which respondent, as before stated, was, till recently, ignorant, he, this respondent,
434 failed to make proper provision and arrangements for the defence of said suit, and to set up his valid, legal, and equitable defence as thereto before the commencement of said insurrection, rebellion, and war. And this respondent further states, since about the re-establishment of partial *practice* and quiet, and the re-organization of this honorable court, to wit, since June, 1866, and previous thereto, he has been subjected to great family & personal afflictions—he has had to mourn the death of a son, his own health for a long time lost, and, for month', so feeble that he was unable to leave his sick bed and room, till, by care, aff'iction, mental suffering, and physical prostration, he, respondent, has hardly been able to give efficient and intelligent attention to much of his important bu*is*eness, and has unavoidable, for the reasons aforesaid, *been* had to leave much of it unattended to, to his great loss, and may see*n* culpably negligent in the present suit, and for not having, at an earlier day, given his attention to it. But respondent most solemnly avows that it has been in no *at*tentional or wilful contempt of this honorable court, its order, decrees, or process, but for the reasons above stated, and those only, has his del*l*ay proceeded in responding to
435 the orders and process of this hon. court, by obeying and carrying out the same, or produced to this court good & valid reasons why he should be ex*h*onorated and released from such obedience and performance, and also from setting up & showing to the court here that he has a good & valid defence to the suit of said complainants, and the enforcement of said alleged decree of the 20th of June, A. D. 1866, as against him, because, respondent says—

1. That complainants have not and never had any cause of action against him—said pretended grant under which they claim title to the land set out and described by them, being but a right in composition to the Indians of the Mission of San José, granted by the authority of the government of Spain, was but a tenancy at will in said Indians, and as a title in fee to the said land, was and is null & void, as has been held and solemnly adjudged by the hon. the supreme court of the State of Texas, when brought before that honor. court at the suit of said John McMullen, under whom these complainants pretended to de-

rai'n title in the case of McMullen vs. Hodge et al., of the 5th Tex. Reports, pp. 34, and subsequent pages, to which case, & the decision
436 therein pronounced, as aforesaid, respondent begs leave to refer, and to read on the hearing hereof.

2nd. That this respondent holds title to the several tracts of land, probably five in number, and amounting in the aggregate near 11,000 acres, contended by comp'aiments to be embraced within the limits of said pretended grant set up by them under patents from the government of Texas granting to him the absolute fee to the said from and under said State; all which he is ready to exhibit and show to this court.

3d. Because said decree is void on its face, being founded on no cause of action, and no proof before the court upon which such decree could rightfully, legally, & equitably be founded.

4th. Because said decree was procured to be rendered as against this respondent, without his having an opportunity to defend said suit & set up his superiorer and perfect right to the land, so far as claimed by him, by the *cautions* and promises by & with said Alexander, as the solicitor of said complainants, his promises and assurances as hereinbefore stated. Wherefore this respondent, having complied with the orders of this court as to matters of costs by paying the same, and being ready & willing to do and perform such other or further order
437 in that regard as this honorable court may deem proper and direct in consideration of the premises, this respondent most respectfully prays this honorable that he may be discharged, held purged of the contempt alleged against him, & set at liberty. And, further, this respondent prays the court, in consideration of the premises, will order & adjudge that the decree and judgement, so set up by complainants of date of the 20th of June, 1866, may be vocated, annulled, & set aside, and he, this respondent, be allowed, on such terms and conditions as to your honor may seem equitable and just, and within such reasonable time as your honor may name, to plead and answer said complainant's bill of complain' against him, & to set up his defence thereto, and have his rights passed upon by this honorable court; or that your honor will be pleased to regard this as a petition to be allowed to file his bill of review, or his bill in the nature of a bill or review of said decree and adjudgement, and proceedings had therein, said bill of review, or bill in the nature of a bill of review, to be filed in such reasonable time as this hon. court may name for that purpose, to the end that said proceedings, judgement, and decree may be
438 reviewed, revised, reversed, and corrected, and the just rights of their respondents upheld & secured to him, conformable to justice & equity; or, if this hon. court should deem it necessary that there should be a separate petition asking for permission to file such bill of review, that your honor will so indicate. and allow respondent's solicitors reasonable time to prepare & present the same, to the end that justice may be done. And further respondent sayth not.

SAM'L MAVERICK.

HANCOCK & WEST,
Solicitors for Resp't.

Sworn to & subscribed before me this 4th day of October, A. D. 1869.
M. HOPKINS, *C'Vrk.*

439 EXHIBIT "H."—*Affidavit of E. M. Pease.*

Filed Oct. 4, 1869.

M. HOPKINS, *Clerk.*

In the circuit court of the United States for the western district of Texas, at Austin.

HEIRS OF BAINBRIDGE D. HOWARD *vs.* HODGE ET OTHERS. } In chancery. No. 10.

Affidavit of E. M. Pease, who, being duly sworn, says:

Some time in the summer of 1859 I was employed by Sam'l A. Maverick, of San Antonio, to defend a chancery suit, which had then been some time pending in the United States district court, at Austin, and which now appears on the record of said court, in the name of Bainbridge D. Howard's Heirs against Archibald Hodge et al., the said Maverick being one of the defendants. At the time I was so employed, a judgement pro confesso had been entered on the rule-docket against said Maverick. I went at once to William Alexander, the solicitor for the plaintiffs, and made an agreement that said judgement would be set aside, and further time given for said Maverick to answer. This was afterward carried out, when I made a written agreement with said Alexander, by which further time was to be given for said Maverick to answer, until said Alexander should give me notice to file an answer in said court.

440 I rested upon this agreement, and filed no answer, although I had one prepared ready for filing. Late in December, 1860, and in January, 1861, I was informed that a judgement pro confesso for want of an answer had been entered against said Maverick in October, 1860. I went immediately to said William Alexander, and asked how such a proceeding came to be taken without giving me notice, according to his written agreement. He replied that, in June, 1860, he had made another agreement in writing with Mr. Maverick in person, by which he was authorized to do so.

This was the first information I had received of any such agreement having been made with Mr. Maverick; that, as he had made an agreement with the opposing counsel in regard to his case, without giving me notice, I should not hold myself responsible for its management after the date of that agreement, and that I would have nothing further to do with the cause.

The written agreement with said Alexander, before named, as made by myself, was signed by him as solicitor for the complainants, and was among my papers as late as the year 1862, but I am unable now to find it, and I believe it must have been destroyed during the year 1865 or 1866, while I was absent from my home, and during which time

441 many other of my papers were destroyed.

E. M. PEASE.

Sworn to and subscribed by E. M. Pease before me, F. W. Sutor, a notary public for Travis County, State of Texas, and ex-officio United States commissioner, this 2nd day of October, 1869.

In testimony whereof I hereunto sign my name and affix my official seal.

F. W. SUTOR,
Notary Public and ex-officio U. S. Commissioner.

Affidavit of E. M. Pease. Filed October 4th, 1869. M. Hopkins, clerk U. S. D. C., W. D. T.

442 And afterwards, to wit, on the 12th day of June, A. D. 1871, bond for appeal was filed in words, to wit:

Bond for appeal.

Filed June 12th, 1871.

M. HOPKINS, *Cl'k.*

In the U. S. circuit court, for the western district of Texas, sitting at Austin.

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } In chancery. No. 10.

Know all men by these presents that we, Branch T. Masterton, assignee in bankruptcy of the estate of John H. Herndon; Mary A. Maverick, the surviving wife of Sam'l A. Maverick, deceased, and executrix of the last will & testament of said Samuel A. Maverick, deceased; Sam. Maverick, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, only heirs-at-law of said Sam'l A. Maverick, deceased, as principals, and Daniel Divine, Sam. Harris, and E. M. Pease, as sureties, are held and firmly bound unto Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett, Caroline H. Bennett, Ephraim H. Lombard, Julia A. Lombard, and Mehitabel Howard, in the full sum of eight hundred dollars, to be paid to the above-named obligees, their executors, administrators or assigns; for which payment, well & truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these
443 presents, sealed with our seals this 12th day of June, A. D. 1871.

Whereas the above-bounden parties heretofore named have, under order of the said court, revived said above-entitled cause, and are about to prosecute an appeal to the Supreme Court of the United States in the same to reverse a final decree made by the said United States circuit court, setting in chancery for the western district of Texas, at Austin, in said State, in said cause No. 10 in chancery, styled Heirs of Bainbridge D. Howard vs. Archibald Hodge et al., and are taking proper steps to cite said obligees to be and appear at the next session of the Supreme Court of the United States, at Washington, District of Columbia, which said final decree was entered on 20th of June, 1866, is substantially as follows:

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } In chancery. No. 10.

On the hearing of the motion of the solicitor for the complainants in this cause, filed March 4th, 1861, to strike the answer of the defendant John H. Herndon from the files, he being in contempt for the cause therein set forth, it is ordered that same be, and is hereby, sustained, and that said answer is ordered to be stricken from the files accordingly.

444 On motion of sol'citors for compl'ts, it is further ordered that the order taken at rules on the fourth day of March, A. D. 1861, taking the supplemental bill, and other pleadings of complainants for confessed be confirmed and made final as to the said defendant John H. Herndon. And whereas, on the 30th day of January, A. D. 1861, a final decree of the said dist. court of the United States for the western

district of Texas, sitting in chancery, was entered against Sam'l A. Maverick, one of the co-defendants in this suit, and since that time the jurisdiction of said court has been changed by law, and said cause is now pending in the circuit court of the United States for the western district of Texas, setting at Austin, it is hereby, on the final hearing of said cause, on the pleadings, orders, and proofs submitted therein, ordered, adjudged, and decreed that the complainants, Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H., (formerly Howard,) his wife; and Mehitabel Howard, who are the heirs-at-law of Bainbridge D. Howard, dec'd, have and recover of said Sam'l A. Maverick & John H. Herndon the tract of land in the original bill of complaint described; and that their title to the same is hereby decree' to be free from all clouds cast thereon by said defendants and all persons claiming or to claim by, through, or under them.

445 Said tract of land is described as follows, to wit:

A certain tract or parcel of land, on or about the 22nd day of November, A. D. 1766, granted by the gov't of Spain according to the forms of law to the Indians of the Mission of San José, and by them conveyed to John McMullen, since dec'd, beginning on the top of Padron Hill; thence running from the north to the south, to the creek called the Alamos at the crossing thereof, where there was placed a land-mark near the road to the presidio of the Rio Grande; thence along the road westwardly to the arroyo or creek Patatrina, where there was placed a land-mark; thence turning towards the north to the road that comes from the cañon to the Lloma Alto, where was placed a land-mark by piling stones a short distance from the land-mark of Baltazar Perez, an adjoining proprietor; thence following an east course to the said Padro Hill to the place of beginning; said tract lying in the counties of Bexar and Medina, in the State of Texas, and being now commonly known as the pasture-land of the Mission of San José. It is further ordered and decreed that all patents, location, and survey obtained or owned by said defendants Maverick & Herndon, which are in conflict with the title of complainants which is decreed to be a good title,

446 are and are hereby adjudicated to be null and void, & that said defendants shall cancel & remove the same.

It is further decreed that a ref'rence is hereby ordered to be made to Mathew Hopkins, esq., as master in chancery in this court, to ascertain and report to this court, at as early a day as may be practicable, all the material facts sought to be discovered by said complainants as against the defendants aforementioned, and that he be empowered, if necessary, to examine said defendants on oath, by interrogatories addressed to them, to the end that such additional decree may be hereafter entered herein as to equity may seem meet; said defendants being adjudged to pay all the costs of this cause incurred & to be incurred in consequence of this decree, for which, so far as already incurred, execution may issue as at *law* after the adjournment of the term or terms prior to and during which they may occure. It is further decreed that the legal title to said tract of land in the original bill described be, and is hereby decreed to be, vested in the complainants, and that said master in chancery shall, as commissioner of this court, execute, and cause to be duly recorded, a deed conveying the legal title thereof from John McMullen, Anthony McMullen, James McMullen, Neil McMullen, Ann McMullen,

447 Morris Egan, and Margaret, (late Margaret McMullen,) his wife, the heirs-at-law of John McMullen, dec'd, to complainants, the said heirs-at-law having answered and submitted to the jurisdiction of this court, and admitted all the material facts alleged against them:

Now, therefore, the condition of this obligation is such that, if the said Branch T. Masterson, assignee, &c., Mary A. Maverick, Sam. Maverick, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good said appeal, then this obligation to be void; otherwise remain in full force and virtue.

Witness our hands and seals (using scrawls for our seals) this day of , 1871.

BRANCH T. MASTERSON, [SEAL.]
Assignee of Estate of John H. Herndon, Bankrupt.
MARY A. MAVERICK, [L. S.]
By GEO. MAVERICK, *Her Att'y-in-fact.*
GEO. M. MAVERICK. [SEAL.]
DANIEL DEBINE. [SEAL.]
E. M. PEASE. [SEAL.]
SAM'L HARRIS. [SEAL.]

The above and foregoing bond has this day been duly examined, & is approved by me, & ordered to be filed. June 12th, 1871.

TH. H. DUVAL, [SEAL.]
Presiding Justice.

448 We, Daniel De*brue* and , sureties on the above and foregoing bond, do, each of us, solemnly swear that we are each worth the sum of eight hundred dollars over and above all debts and liabilities and exemption of property from force sale under execution.

DANIEL DE*BRUE*.

Sworn to and subscribed before me this 3d day of June, 1871. To certify all of which I hereunto set my hand and the seal of my office the day and date above written.

[SEAL.]

A. L. McLANE,
U. S. Comm. W. D., Texas.

Appeal bond filed June 12th, 1871.

M. HOPKINS,
Clerk U. S. D. C.

And afterwards, to wit, on the 30th day of August, A. D. 1871, citation on appeal issued, which is in words, to wit:

449 *Citation on appeal.—Iss'd Aug't* 30, 1871.

UNITED STATES OF AMERICA:

BRANCH T. MASTERSON, ASSIGNEE IN B'K'TCY of John H. Herndon, bankrupt, and Mary A. Maverick, surviving wife of Samuel A. Maverick, dec'd, George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, heirs-at-law of Sam'l A. Maverick, dec'd, appellants,

vs.

VOLNEY E. HOWARD, RICHARD A. HOWARD, Russell Howard, Thomas H. Bennett, Caroline H. Bennett, E. H. Lombard, Julia A. Lombard, and Mehitabel Howard, heirs-at-law of Bainbridge D. Howard, dec'd, appellees.

The President of the United States to Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett, Caroline H. Bennett, E. H. Lombard, Julia A. Lombard, and Mehitabel Howard, heirs-at-law of Bainbridge D. Howard, deceased, and Howard & Harrison and George F. Moore, their solicitors:

You are hereby cited and admonished to appear at the next term of the Supreme Court of the United States, to be held at Washington on the first Monday of December next, to show cause, if any there be, why the decree rendered in your favor by the circuit court of the
450 United States for the western district of Texas in a certain suit or cause therein formerly depending between you as complainants, and John H. Herndon, Samuel A. Maverick, and others, who were defendants, numbered (10) upon the chancery docket of said court, at Austin, should not be reversed, and speedy justice be done to the parties in that behalf, in pursuance of an appeal obtained by the said Branch T. Masterson, assignee in bankruptcy of John H. Herndon and Mary A. Maverick, surviving wife of Samuel A. Maverick, deceased; George M. Maverick, Willie H. Maverick, Mary B. Maverick, and Albert Maverick, heirs-at-law of Samuel A. Maverick, deceased, according to their petition filed in the circuit court of the United States for the western district of Texas, at Austin.

Witness the Hon. Salomon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court at Austin this 30th day of August, A. D. 1871.

[L. S.]

T. H. DUVAL,
U. S. Judge.

Teste, with seal of court, day, and date above written.

M. HOPKINS, *Clerk.*

451 The marshal's return thereon is in words, to wit:

Came to hand Sept. 2, '71, and executed same day by handing to Geo. F. Moore, one of the solicitors of the appellees, a true copy of this writ, certified to be such under the seal of court by the clerk of the court, Sept. 2, 1871.

THO'S F. PURNELL, *U. S. M.*
Per JOHN H. TRAUNHANE,
Deputy U. S. Marshal.

And a further return thereon is as follows:

I certify that, on the 6th day of September, 1871, at San Antonio, in my district, I served the within writ of citation on appeal on Thomas S. Harrison by showing to him the same, with the seal of the court thereon, and at the same time delivering to him a copy thereof and also a copy for Russell Howard, and Thomas S. Harrison accepted service of the same as attorney and agent for Russell Howard.

THOMAS F. PURNELL,
U. S. Marshal.

Service accepted this 6th day of September, 1871.

RUSSELL HOWARD,
By T. S. HARRISON,
Agent & Att'y.

I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing four hundred and fifty-one written pages contain a full and true transcript of the record of all the proceedings had in this court in case No. 10 ch'c'y, entitled Bainbridge D. Howard's Heirs vs. Archibald Hodge et als., as they appear of file & record. In teste whereof I hereunto set my hand and the seal of said court, at Austin, this 11th day of September, A. D. 1871.

[SEAL.] M. HOPKINS, *Clerk.*

(Indorsement on cover:) No. 404. Branch T. Masterson, assignee in bankruptcy of John H. Herndon, bankrupt, et al., appellants, vs. Volney E. Howard et al. W. Texas C. C. U. S. Filed 24th November, 1871.

O

Supreme Court of the United States.

DECEMBER TERM, 1872.

BRANCH T. MASTERSON *et al.*, Assignee in Bankruptcy of JOHN H. HERNDON *et al.*,

vs.

VOLNEY E. HOWARD *et al.*

No. 169.

STATEMENT OF THE CASE.

On 17 February, 1851, Bainbridge D. Howard filed his bill in the district court of the United States, at Galveston, Texas, against John H. Herndon, Samuel A. Maverick, and ten others, setting forth that "on or about the 22d, November, A. D. 1766, the Government of Spain, according to the forms of law and by the regularly constituted officers of the government, granted to the Indians of the population of the Mission of San José a certain tract or parcel of land, situated, lying, and being in what is now the county of Medina, in the State of Texas," &c.

(Here follows a very uncertain description, p. 3.)

The complainant claims that through regular mesne conveyances he is the owner of the land, "all of which will more fully and at large appear by the grant to said Indians, and the chain of conveyances to your orator, to which for greater certainty at the hearing your orator begs leave to refer." (p. 3.) The bill states that the complainant is in possession, and that the defendants had made sundry locations of land certificates upon, and claimed patents to said land, which constituted a cloud upon his

title; wherefore, and to avoid a multiplicity of suits, he brought his suit in equity.

The bill was brought while the 40th rule, which required only interrogatories to be answered, was in existence. Hence we find the defendants interrogated as to what locations, &c., they had made within the boundaries of the described tract, and in conflict with the complainant's claim; and what locations and surveys others had made; and the complainant prayed that such locations, surveys, and patents might be decreed to be void, or that the complainant might be quieted in his title and possession, and all obstructions to its enjoyment removed. (p. 4.)

The general prayer for relief is in the alternative, and inartificial.

After sundry matters in relation to service, and the transfer of the cause to Austin, the death of the complainant was suggested, and no bill of revivor having been filed, according to the rules, the bill was dismissed; whereupon the complainant filed an affidavit, in which it is stated, among other things, that "the papers and documents alluded to in this affidavit are a certified translated copy of the original title to McMullen to the land in controversy," &c. (p. 14.)

In a second bill of revivor, filed under a stipulation, the complainants state that John McMullen, on the 5th November, 1849, executed a covenant for title to Bainbridge D. Howard, and died without having conveyed, and that his heirs refused to convey, and, in effect, they pray for a specific performance against the heirs of McMullen.. (pp. 25, 26.)

And in describing the original title they say, that the Government of Spain granted the lands to the Indians of the population of the Mission of San José, who (the Indians) conveyed the land to John McMullen, who covenanted to convey to Bainbridge D. Howard; and that "by the laws in force at the time of the original grant to said Indians, and subsequently thereto operating on said grant, and the contract indicated thereby, an indefeasible estate

in fee was vested in said Indians, and in those claiming and deraigning title through them, down to and including said John McMullen, deceased; and that a valid, equitable title to said tract was made by said McMullen to said Bainbridge D. Howard, deceased, which is now vested in your orators, as his heirs at law and as foresaid; all of which will more fully and at large appear by the grant to said Indians, together with a chain of conveyances down to said McMullen, and by said instrument; to all of which, or to certified copies of the records thereof, if the originals cannot be produced, for greater certainty, at the hearing hereof, your orators crave leave to refer." (p. 25.)

The averment is repeated as to the locations of the defendants, and substantially the same interrogatories are propounded. (pp. 28, 29.)

The prayer of this bill is for discovery only as to the material defendants, and for specific performance against McMullen's heirs. (p. 29.)

At the October rules, 1860, the complainant entered an order *pro confesso* against Herndon and Maverick; and on 5th November, he filed a motion that reference be made to a master, or that Herndon and Maverick be required to answer interrogatories, to be filed against them. (pp. 30, 31.)

No notice of this motion was given, yet on the 18th January, 1861, a decree *pro confesso* was entered as to all the defendants except Herndon, and as to him the decree *pro confesso* was set aside, "and that he have time extended to him to file his answer in this cause until the rule day in March next, upon condition that he shall pay all the costs of the complainants in this case; *for which execution may issue upon this decree as upon a judgment at law.*" The complainants, in one form and another, discontinued as to ten defendants, served and not served.

The order further says, and that the complainants "have and recover of said Maverick the tract of land in the original bill described; and that their title to the same be and is hereby decreed to be free from all clouds cast thereupon

by said Maverick, and all persons claiming by, through, or under him. And that the patents, locations, and surveys obtained by said Maverick, in conflict with the title of the complainants, *which is decreed to be a good title*, are hereby adjudicated to be null and void." A reference was made to a master to ascertain the facts sought to be discovered, (p. 33,) and a decree of specific performance was decreed against the heirs of John McMullen. (p. 34.)

On the 4th March, 1861, Herndon fully answered the bill, (pp. 34–37,) in which he set up the nullity of the title to the Indians of the Mission of San José, and that so it had been determined by the supreme court of Texas. And on the same day, March 4, 1861, complainants, assuming against the truth, (pp. 47, 48,) that Herndon had not paid the costs, made that a reason for entering an order *pro confesso*, and at the same time he moved to take Herndon's answer from the files. (p. 38.) Here, and indeed before that time, the judicial functions of the federal courts in Texas were indefinitely postponed by the secession ordinance. (Paschal's Dig., p. 78.)

On the same day the complainants' solicitor took his order at rules *pro confesso*, and filed his motion to take the answer off the files. This court historically knows that at that time secession was as much an accomplished fact as it ever was; that the Union armies in that State had surrendered to the State convention; the secession ordinance had been ratified by the people, and all federal officers in Texas had ceased their functions. The civil war had in fact commenced. Neither party could take any order under the motion or upon the answer. The district courts of Texas were not organized for any purpose, until the spring of 1866. And while section 5 of the President's proclamation of 17 June, 1865, seemed to contemplate that "the district *judge*, for the judicial district in which Texas is included, will proceed to hold courts in accordance with the provisions of the act of Congress," (Paschal's Dig., p. 1494,) yet the whole section contemplated a court for the purposes of confiscation. And it was

by the proclamation of 20 August, 1866, that the President declared that "subsequently to the second day of April, 1866, the insurrection in the State of Texas has been everywhere suppressed and ended, and the authority of the United States has been successfully and completely established in said State of Texas," &c. (Paschal's Annotated Digest, p. 1502.)

And by another section, it is said that the civil authority, State and federal, can be sustained.

This decree preceded this proclamation, and it was, *in lege, non dies*, and all subsequent action upon it was like the decree, without authority, and void.

On the 20th June, 1866, the complainants took an order transferring the cause to the circuit court at Austin; and, in the same order, without notice, they entered a kind of decree, that "all patents, locations, or surveys obtained or owned by said defendants, Maverick and Herndon, which are in conflict with the title of complainants, *which is decreed to be a good title*, are, and are hereby, adjudicated to be null and void, and that said defendant shall cancel and remove the same." [There was nothing in the prayer or the bill which authorized this order.] A reference was made to a master, and a decree of specific performance entered.

This decree, be it noted, bore date the 20th day of June, 1866, and was chiefly in behalf of citizens of California and Illinois against citizens of Texas. All the subsequent proceedings were irregular efforts to enforce and to set aside the decree. Part of these proceedings contain admissions and statements which will be noticed in the argument. Herndon having become bankrupt and Maverick having died, after spirited resistance, the cause was revived, and the assignee of Herndon and the devisees and heirs of Maverick were granted an appeal. (pp. 161, 162.) The appeal bond is on pages 180–182. The appeal having been granted in open court, after contest, although not at the same term, no citation of appeal was necessary. (United States *v.* Gomez, 1 Wall., 702; S. C., 3 Wall., 760–765.)

The citation and service are, however, regularly in the record. (pp. 1, 2.)

The appeal bond, on pages 180–182, determines that the appeal was from the decree of 20th June, 1866.

I. The first point goes to the foundation of the decree itself.

It will be observed that it covers action had upon a motion of 4 March, 1861, (which final action was had on 20 June, 1866,) without notice to the defendants, in behalf of citizens of California and Illinois against citizens of Texas. In other words, according to the decisions of this court, it was a decree between alien enemies before the termination of the civil war in Texas, and therefore a nullity. (United States *v.* Anderson, 9 Wall., 70, 71; Hanger *v.* Abbott, 6 Wall., 532; The Protector, 9 Wall., 689; The Protector, 12 Wall., 702.) The last-named case clearly settled that the civil war was not closed in Texas until 20 August, 1866. And Dean *v.* Nelson, (10 Wall., 160, 172,) and The Railway Company v. Trimble, (10 Wall., 367, 377,) hold such decrees to be void. These general principles, as well as the proclamations on which they rest, will be found in Paschal's Annotated Digest, p. 1132, note 1223, and arts. 7214–7234, notes 1283–1387.

The effects of the war, in placing the sting of disability in all transactions between the citizens of the loyal and the rebel States, are thus stated by this court:

"War, when duly declared or recognized as such by the war-making power, imparts a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy's country. (The William Bagaley, 5 Wall., 405; Jecker *v.* Montgomery, 18 How., 111; Wheat. on Marit. Capt., 209.) Hanger *v.* Abbott, 6 Wall., 535.

"Upon this principle of public law, it is the established rule, in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation. (The Rapid, 8 Cranch, 155; The Hoop, 1 Rob. Adm., 196.) Hanger *v.* Abbott, 6 Wall., 535.

"After reviewing Chit. on C. & M. Law, 423; The Hoop, 1 C. Rob.'s Adm., 200; Alcinous *v.* Nigreu, 4 Ell. & Blackb., 217; Lawrence's Wheat. Int. Law, 187–288, 541–877; Furtado *v.* Rogers, 3 Bos. & Pull., 191; *Ex parte* Boussmaker, 13 Ves., jr., 71; Signora, Edw's Adm., 60; Brown *v.* United States, 8 Cranch, 110; Ware *v.* Hilton, 3 Dall., 199; Upton, Marit., W. & P., 42; Halleck's Int. Law, 358; Ang. on Lim., § 24; McCluny *v.* Silliman, 3 Pet., 270; Bank of United States *v.* Daniels, 12 Pet., 32; Porterfield *v.* Clark, 2 How., 125; Mann. Int. Law, 130; Bynk., b. l. c. 3; Vat., b. 3, c. 5, § 77; Townsend *v.* Jamison, 9 How., 407; Story's Confl. of Laws, §§ 516, 577; Chit. on Con., 10 Am. ed., 907; Wolf *v.* Oxholm, 6 Maul. & Selw., 92; 2 Wildeman's Int. Law, 17; Prideaux *v.* Webber, 1 Lev., 31; Lee *v.* Rogers, 1 Lev., 110; Miller *v.* Prideaux, 1 Keble, 157; Hall *v.* Wybourne, 2 Salk., 420; Aubrey *v.* Fortiscue, 10 Mod., 205; 1 Kent's Comm., 11 ed., 169; Grot., b. 3, c. 20, §§ 16–18; Barrick *v.* Buba, 32 Eng. Law and Eq., 465; Wood *v.* Allen, 2 Dall., 102; Foxcraft *v.* Galloway, 2 Dall., 132; Wall *v.* Robson, 2 Nott & McCord, 498; Hopkins *v.* Bell, 3 Cranch, 458; Higginson *v.* Air, 1 DeS., 427; 2 Co. Litt., 249b; Bract., lib. 4, fol. 240; 1 Hale's P. C., 347; Brooke, tit. FAILURE OF RECORD; Blansh. on Lim., 163; 6 Bacon's Abr., 395; 1 Plow., 9 b, the court said: But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the Government, for which all the citizens are responsible. Peace restores the right and the remedy, and as that cannot be, if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period. (Hanger *v.* Abbott, 6 Wall., 542.)

"The war arrested the running of the statute of limitation as between parties residing in different sections of the Union, who are recognized as alien enemies. (Hanger *v.* Abbott, 6 Wall., 522.) And, upon analogy, the war arrested the running of the time within which a writ of error might be prosecuted by a citizen of a loyal State against a citizen of a rebel State." (The Protector, 9 Wall., 689, 690; Paschal's Digest of Decisions, §§ 1731–1741.)

And Chancellor Kent, in Griswold *v.* Wadrington, (16 Johns., 444–483,) exhausts the whole learning upon the subject down to 1819, and shows that every effort to create an exception has failed; and he concludes that the law has

put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the Government. The same principle is stated by this court in White *v.* Burnley, (20 How., 249;) and by the supreme court of Texas in Ogden *v.* Lund, (11 Tex., 690.) And the courts are bound judicially to know that the war existed. (The Prize Cases, 2 Black, 666.) And these rules are applicable alike to international and civil wars: and all people of each State or district, in insurrection against the United States, must be regarded as enemies, until by action of the legislature and the executive, or otherwise, that relation is permanently changed. (The Prize Cases, 2 Black, 687, 688; Mrs. Alexander's Cotton, 2 Wall., 419; The Venice, 2 Wall., 274; Paschal's Annotated Constitution, note 118.)

And the duration of the war is thus stated by the Chief Justice:

"The war did not begin or close at the same time in all the States. There were two proclamations of intended blockade: the first of 19 April, 1861, (12 Stats. at Large, 1258,) embracing the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; the second of 27 April, 1861, (12 Stats. at Large, 1259,) embracing the States of Virginia and North Carolina; and there were two proclamations declaring that the war had closed: one issued on 2 April, 1866, (14 Stats. at Large, 811,) embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas; and the other issued on 20 August, 1866, (14 Stats. at Large, 814,) embracing the State of Texas. In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and close of the war in the States mentioned in them." (The Protector, 12 Wall., 702.)

As well upon these precedents as upon the authorities cited, which meet every possible transaction between persons at war with each other, the judgment was simply a nullity.

Unless, then, this judgment fails to come within the

general principles thus settled, this court must hold the decree, *in limine*, to be null and void. Certainly the complainants' case presents nothing of merit. The payment of costs by Herndon was not a condition precedent to the decree; but it was an order upon which execution might issue for a very small amount. In pursuance of that leave the defendant, at no little risk, filed his answer on the 4th of March, 1861. And he then paid the costs.

This view will prevent the necessity of considering the gross irregularities of joining defendants for specific performance with defendants having adverse interests, and which joinder, *per se*, disclosed a fraud upon the jurisdiction of this court; of proceeding upon a motion, without notice, five years after it was made; of proceeding *ex parte* to take a decree *pro confesso* against the truth of the record, without producing the title or any evidence of impossible mesne conveyances; of entering in the chancellor's decree a declaration in favor of the validity of a title and mesne conveyances, without producing or filing these papers, or ever exhibiting them to the chancellor; of decreeing beyond the case made by the bill, and beyond what was prayed, and then placing unsuspecting men in contempt, when the contempt complained of was not within the relief sought or granted; of taxing the whole costs against two defendants, when there were sixteen other defendants for whom they could not possibly be responsible; and of many other things painful and unprofessional.

II. Should it be possible to give any effect to the decree, then we are brought to the question, what does the appeal bring into review?

Some familiar principles of equity practice will not be denied. Those applicable to this case are—

1. That whatever form the proceedings and the orders may assume, the complainant can only recover according to the case and the title stated by himself, and he must state sufficient matter of fact, *per se*, to maintain his case. (Harrison *v.* Nixon, 9 Pet., 483; Langdon *v.* Goddard, 2

Story's Rep., 267; Story's Eq. Pl., § 40; English *v.* Ford, 2 Pet., 595; Texas *v.* Hardenberg, 10 Wall., 86.) That is, no relief can be granted, except such as is agreeable to the case made by the bill. (Texas *v.* Hardenberg, 10 Wall., 86; English *v.* Foxall, 2 Pet., 595.) The rule is thus deduced in Texas:

"Facts not alleged, although proven, cannot form the basis of a decree. Every bill, (or petition,) in an equity cause, must contain, in itself, sufficient matter of fact, *per se*, to maintain the case of the plaintiff. (Harrison *v.* Nixon, 9 Pet., 503; Hall *v.* Jackson, 3 Tex., 309.)"

2. If the defendant make default, and the complainant take a decree *pro confesso*, and proceed *ex parte* under Rule XVIII, he must file his proofs; and upon appeal, the first inquiry is, has the complainant stated a case in law, which entitles him to the decree? For if upon demurrer, the bill would have been dismissed upon error, where that is the practice, and upon appeal where it is not, the case stated will be considered; and if it be insufficient in law, the decree will be reversed. (Wilson *v.* Waterman, 6 Rich. Eq., (S. C.,) 255; 1 Daniel's Practice, 4th ed., by Perkins, p. 517, note 2; p. 525, note 4.) For the decree *pro confesso* only amounts to an admission of the allegations in the bill. (Robinson *v.* Townsend, 3 Gill & J., 413, 424.) And if there be uncertainty of statement, which renders reference to a master necessary, the complainant can have no relief without proof. (Pegg *v.* Davis, 2 Blackf., 285; Platt *v.* Judson, 3 Blackf., 258; Landon *v.* Ready, 1 Simons & Stuart, 44.)

The rule is, that the defendant, on error or appeal, may contest the sufficiency of the bill itself, and insist that the averments contained in it do not justify the decree. (Gault *v.* Hoagland, 25 Ill., 268; Daniel's Ch. Pr., p. 531, note 8.) The rule in Texas is the same:

"This being an appellate court, it is our province to decide those questions, in general which, were passed upon or presented by the court below. (Campbell *v.* Stakes, 2 Wend., 145; Ketchum *v.* Evertson, 13 Johns., 361.) The

exceptions to the rule are, where the foundation of the action itself appears to have failed, or where the objection first taken in this court goes to the merits of the action, and could not have been obviated, had it been made in the court below. (Petty *v.* Cleveland, 2 Tex., 405; Pettus *v.* Perry, 4 Tex., 488.)

"The rule, that errors must be assigned, only applies to objections which the party, by his silence, may be deemed to have waived, and which, when waived, still leave the merits of the case to rest with the judgment. But if the foundation of the action has manifestly failed; if we cannot, without shocking the common sense of justice, allow a judgment to stand; if the objections go to the merits and foundation of the action, so that, upon the case made by the pleadings, the party has no right to the judgment, such objections will be considered, whether assigned as error or not. (Campbell *v.* Stokes, 2 Wend., 146; Palmer *v.* Lorillard, 16 Johns., 343; Harrison *v.* Nixon, 9 Pet., 503; Jones *v.* Black, 1 Tex., 529, 530; Rankert *v.* Clow, 16 Tex., 13; Hollingsworth *v.* Holshousen, 17 Tex., 47; Wetmore *v.* Woodhouse, 10 Tex., 33; Salinas *v.* Wright, 11 Tex., 577; Earle *v.* Thomas, 14 Tex., 583; Pettus *v.* Perry, 4 Tex., 488; Petty v. Cleveland, 2 Tex., 405; Paschal's Digest of Decisions, §§ 2785, 2788.)"

III. The rule of practice being established, we are to look to the case made by the bill, as well as to sundry altercations in the record subsequent to the decree, in order to determine, not only the character of the title, but the very title on which the complainants relied. This was a supposed grant to the Indians of the Mission of San José, as a community, about the date of 1765, and a conveyance by some supposed survivors of the children of these Indians, executed in 1833 to John McMullen; the admitted fact that McMullen sued these defendants and others in Bexar district court, for this identical land, declaring upon the identical title, and having come to issue as to one of the defendants, Hodge, the judgment was against McMullen in that suit; that in 1848 the supreme court of Texas, in a learned opinion, decided against the validity of this grant, and thereupon McMullen entered into some kind of covenant, never yet exhibited in the record, whereby, upon some un-

known conditions, he agreed to convey the property to Bainbridge D. Howard, of New Orleans, with the unconcealed purpose to give jurisdiction to the federal court, and with the vain expectation that this court would disregard the decision of the supreme court of Texas, and decide in favor of the validity of a nullity. (See Alexander's affidavit, p. 101.)

Interesting as the examination *de novo* might be, we are saved that necessity. By a long series of decisions of this court, where a rule of property has been established in a State court, it will be followed by this court. (Jackson *v.* Chew, 12 Wheat., 162; Beauregard *v.* New Orleans, 18 How., 497; Suydam *v.* Williamson, 24 How., 432.) Even to the overruling its own decisions upon the same law, which has been ruled differently in State courts. (Arguello *v.* The United States, 18 How., 539; League *v.* Egery, 24 How., 265, 266; Foote *v.* Egery, 24 How., 268.) The case of Suydam *v.* Williamson, (24 How., 434,) has been followed in subsequent cases. Indeed the rule has become an axiom. (Butz *v.* City of Muscatine, 8 Wall., 583.)

"*Communis et recta sententia est, in rebus immobilibus servadum esse jus loci in quo bona sunt.*"

"The power of establishing federal courts, and endowing them with jurisdiction to determine controversies between certain parties, affords no pretext for abrogating any established law of property, or for removing any obligation of the citizens of the States to submit to the rule of the local government." (Suydam *v.* Williamson, 24 How., 433; Oakey *v.* Bennett, 11 How., 35, 45.)

Tested by this rule the complainants have simply stated themselves out of court, by declaring upon a title which the supreme court of Texas has ruled to be void.

It will be seen that the case of McMullen *v.* Hodge, (5 Tex., 34 to 87,) underwent a great deal of discussion by the counsel and by the court; and that all the law bearing upon the subject received the fullest construction.

Of the grant Mr. Justice Lipscomb says:

"The grant on its face shows that it was a limited title, intended to be conveyed. It was granted to the Indians of the Mission of San José, for their labors, pastures, and other purposes, without the right of alienating, ceding, or selling any part thereof, without the superior license of the supreme government of the kingdom. The plaintiff contends, that it conveys the fee simple, subject to be divested only on a sale, without the license expressed; and that it can only be taken advantage of by the government.

"Let us examine into the subject. Had the grant purported to be in fee, subject to a forfeiture on failure to do some particular act, perhaps there would be some soundness in the argument. But the inhibition to sell or alienate is inconsistent with the fee. And there is another part of the grant that seems to fix the true character and extent of the right conveyed by the grant. It is that the Indians are to receive it 'sin media annata;' this has been translated in the record sent up 'without interest.' This translation is not believed to be correct; the correct translation is 'without the payment of half-yearly profits;' and a reason is assigned for such remission of the half-yearly profits; that is, because they are Indians of the Mission of San José, to whom the grant is made. It shows that the character of the grant was not to be changed by such remission; that it would have been due on such sale or grant; and the 'media annata' characterizes it as a tenancy, and not as a purchase in absolute dominion, constituting a feud. Drs. Manuel and Asso say, in the Institutes of the Civil Law of Spain: We only observe one remarkable difference in point of succession or descent; for Lib. 6, Tit. 26, P. 4, says, that the succession does not descend beyond the grandson, but returns to the lord; and it is clear that by the feudal common law, the succession was extended *in infinitum*. (2 White, 80.) And they say that the 'media annata' was given in lieu of military service. (*Id.*, p. 79.) The inhibiting the sale shows that the fee was intended to be retained in the grantor, or feudal lord; and but for the expression, that the 'media annata' is not to be exacted, the Indians would have been liable to pay it every half-year so long as they enjoyed the usufruct.

"It is probable, however, that this kind of title was known under the laws of Spain as composition, and the title created the holder a tenant at will. In Lib. 4, Tit. 12, Law 15, of the new Recopilacion, under the head of lands to be let to composition, we find as follows:

"'All lands which are to be admitted to composition shall be sold at auction, and without reserve, to the highest bidders, as tenants at will.' (2 White, 53.) And again, in Lib. 4, Tit. 12, Law 19: 'No one shall be admitted to composition, who shall not have been in possession thereof for the term of ten years, although he should state that he was in possession at the time; for such circumstance, by itself, is not sufficient. And communities of Indians shall be admitted to composition in preference to other private individuals.' (2 White, 54.) The land in question was sold to the highest bidder; and it will be seen by reference to the proceedings, in the process of proving the title to the Indians of the Mission, that their having been long in occupancy and possession of the lands for pasturing their flocks, was urged as giving to them a right of preference over the claim of Castello."

After quoting the evidence of Colonel Antonio Navarro, the learned judge says:

"The conclusion to be drawn from this evidence is, that whatever may have been the object of the founders of the Missions, practically, they were seminaries for instruction in Christianity and the arts of civilization, of such Indians as, from time to time, should belong to the Mission; and that during such connection they were in a state of pupilage to the president of the establishment; and that twelve years was the duration of such pupilage. A grant then to the Indians of the Mission of San José, even if there had been no words of limitation in the grant, may well, as it was said by the defendant's counsel, be compared to a grant made to the students of a manual-labor institute, of lands for their experimental farms, or to the students of a university, for a *campus* or common, for exercise. In such case, it could not for a moment be contended that the right of property was granted in fee to the particular students who might, at the time of the grant, belong to the institution, or their heirs; but it is manifest that it would only grant the right of way to such of them as, from time to time, should belong to the institution; and should the institution, from any cause, become extinct, no right would survive to the descendants of the pupils."

Then, after reviewing the action of the government in relation to the extinguished missions, the learned judge adds:

"There is another reason why I believe the grant in this case was in composition. It is that the attorney at law, representing himself as the attorney, or agent, in that court, for the religious affairs of the Holy Evangelical Mission of San José, predicates the claim for the lands on the authority of Law 19, Tit. 12, Book 4, of the New Recopilacion, cited already in this opinion; and the approbation of the attorney general for the Crown was based on the same law. It will be seen by reference to this Law, and to Law 15, (same Book and Title,) that all lands sold under these laws were only in composition; and the purchasers bought and received titles as tenants at will. If the clause against alienation had not been contained in the grant, I should still have been constrained to the conclusion, from the proceedings in procuring it, that only tenancy at will was conveyed. In my judgment, the protection was only expressed because the beneficiaries were Indians, and it was repugnant to law for them to alienate the lands so granted. If the result of Castello's application had been favorable to him, I believe that he could have taken under the same laws, and only have been constituted a tenant at will; and as he was a citizen and not an Indian, perhaps there would have been no inhibition in the grant against alienation; but in the event of his selling, his vendee would have been only a tenant at will; and in this aspect, it is not at all material to decide whether the grantees took the land as a corporation, or as a village, or community of Indians: because, if taken in composition, the degree of title would be the same; and the law prohibiting Indian sales would be equally obligatory. I think it may be well doubted whether large grants of pasture lands were ever authorized, in any case, by the laws of Spain. It seems to have been the policy of Spain, not only in her old dominion, but also in the colonies, to encourage a pastoral life. This may fairly be inferred from the regulations of the Measta, and the various decrees regulating the use and occupation of grazing lands. (See Royal Instructions for selling the San Merced, 2 White, 128, sec. 21; *Id.* p. 134, sec. 76; see, also, 2 White, 153, on the Common and Pasture Grants.")

And in conclusion he says:

"That the grant relied on by him as the foundation of title, only admitted the Indians of the Mission of San José to composition; and that it constituted them tenants at will of the government;

"That, by the laws in force at the date of the grant, the Indians could not lawfully alienate their possessions without the consent of the government;

"That, having seen no evidence of any authority or consent to such sale, it is void, and gives no title to the purchaser;

"That the lands sued for became, by the extinction of the Mission of San José, a part of the public domain;

"And that the judgment ought to be affirmed, and it is accordingly affirmed."

Thus we see that upon this title, upon a case *proved*, (and not, as in this case, without any proof whatever,) the supreme court of Texas went to its very foundation, and denied the validity of the plaintiff's title.

It is assumed that the case of McMullen *v.* Hodge has been qualified, explained, or overruled by the opinion of Treviño *v.* Fernandez, (13 Tex., 653.)

But a careful examination of that case will show that the character of the titles was wholly different, and the reasoning, so far from overruling, strengthens the opinion in McMullen *v.* Hodge.

The learned chief justice said, in Treviño *v.* Fernandez, that

"On examination and comparison of the titles, it will be found that there is a striking dissimilarity between the grant in McMullen *v.* Hodge and the one presented in this cause. In both, the grant was by composition; but in the former it was to Indians of a mission, with a prohibition against alienation, without license, under the penalty of forfeiture of the grant. The title was held not to vest in the Indians belonging to the mission at the time of the grant, or their heirs, but to give a usufructuary right to such as should, from time to time, belong to the mission; and, should that become extinct, no right would survive to the Indians, who were but pupils of the mission, or their descendants; that the mission had been extinguished, and their lands restored to the public domain, before the rights of the plaintiff had accrued under his purchase from the supposed descendants of the mission. But in this case the primitive judge, waiving all defects and irregularities in the previous proceedings, &c., grants an ample title of property in the lands, without any exception or reservation

whatever; and with the usual conditions of cultivation, and the liability of the lands to be used for public purposes, compensation being made, the lands are declared to be vested in the grantees, and their heirs and successors, as obtained by a just and legitimate title of property.

"The only point in which there is any similarity is, that in both the grant was expressed to be by composition. But this point of similarity does not necessarily impress them both with the same qualities in every particular.

"In McMullen *v.* Hodge, (5 Tex., 37, 59,) the counsel on both sides conceded that such grants gave but a tenancy at will. And the court, acting doubtless on the presumption of the correctness of these admissions, treated the title as conveying only such limited estate. The admission of counsel and the opinion of the court were founded doubtless upon L. 14, Tit. 12, Lib. IV, Recop. de las Indias, as translated in 2 White's Recop., (p. 53,) in which it is declared, that all lands admitted to composition shall be sold at auction, and without reserve, to the highest bidder, as tenant at will, (*censo al quitar*,) agreeably to the law of the kingdom of Castile. The original is in the following terms, viz: 'Y todas las que estuvieren por componer absolutamente haran que se vendan a vela y pregon, y ameten al mayor prestor, dandoselas a razon de censo al quitar, conforme a las leyes y pragmaticas de estos reinos de Castilla.'

"Mr. Schmidt, in his Civil Law of Spain and Mexico, (p. 321,) translates the word 'censo' as 'ground rent.' Mr. Johnson, in his Translation of the Institutes of Aso and Manuel, gives annuities as the equivalent of the same term; and such annuity is defined by Aso and Manuel as a contract, by which one person sells and another purchases a right to receive an annual pension or sum. (1 White, p. 145.) Febrero defines 'censo' to be an incumbrance, which one imposes upon his property in favor of another, who advances him a certain capital; and that in that sense it was the right of receiving an annual pension, to secure the payment of which some other property is pledged. (Febrero Mejicano, vol. 3, p. 101.) Sala defines it to be the right of exacting from another, to whom we have granted something, an annual rent or pension. (Lib. II, Tit. 19, § 2.)

"It appearing that a 'censo' is an annuity, we will inquire what species of 'censo' is that which is denominated *al quitar*. And we find that, in the dictionaries of Escriche,

of Salva, and the late Dictionary de la Lengua Castellan, and in the works of Sala, Febrero, and in the Laws themselves, the words 'censo al quitar' and 'censo redimible,' are used as equivalent to and identical with each other, and they both mean a redeemable annuity.

"There are three principal species of 'censo,' as known to the laws of Spain, viz, the emphyteutic, the *consignativo*, and *reservativo*. The emphyteutic is the right which one has to exact from another a certain annual pension or sum, by virtue of the transfer to him of the usufructuary right of real property, the legal title remaining in the grantor. This estate is subject to several burdens, and liable to forfeiture on several conditions, which we need not specify. The 'censo consignativo' is the right to exact from another an annuity, in virtue of having advanced money, and which money is made a charge upon lands of the person who promises to pay an annuity; the full title to such lands, however, remaining in the grantor of the annuity.

"The '*censo reservativo*' is the right to receive from another an annual pension, by virtue of having transferred land to him by full and perfect title. (Sala and Escriche, *verbo* CENSO.) The incidents of a *censo consignativo* need not be discussed, as in no sense can they apply under the facts of this case. The grant is emphyteutic or reservative. In both lands are given subject to annuity; but in the first the transfer is only of the equitable right, the legal title remaining in the grantor; whereas by the latter, both the legal and the equitable estates are conveyed to the grantee. That this is a reservative grant, viz, one conveying full dominion, is manifest from the character of the annuity, which by law is declared to attach to composition titles, viz, its redeemable quality. An emphyteutic annuity is not, as a general rule, redeemable; and when a perpetual annuity in an emphyteutic contract is reduced to one which is redeemable, the grant loses its emphyteutic quality, and both the usufructuary and the direct dominion are passed to the grantee of the land. (Febrero Mejicano, vol. 3, pp. 106, 115.)

"It seems that a redeemable annuity, charged on land, is evidence of full dominion in the grantee; that he has more ample right than that derived from emphyteutics; and that his estate, instead of being a tenancy at will, as known to the English law, is the very opposite; that the only will about such title is that of the tenant himself, who

can, at his pleasure, redeem the annuity charged upon his land.

"Among other rights, the grantor in such contract is entitled to preference as a purchaser, when a sale is to be made by the tenant, and to notice of such sale, under penalty of forfeiting the land; and when he does not purchase, he has a right to the one-tenth, the one-twentieth, or the one-fiftieth, as may have been agreed upon in the original deed. (Febrero, vol. 3, p. 104, Escriche.)

"No doubt conditions might be imposed on composition as on other titles. As, for instance, in the grant under which McMullen claimed, there was a *restraint on the power of alienation.* But such restrictions are not imposed merely because titles are by composition. The laws nowhere give countenance to the idea that a title by composition is not as perfect and as ample as that by sale. In the ordinance of 1757, (2 White, 64,) titles by composition and by sale were classed together; and possessors of lands sold or compromised before the year 1700, on the exhibition of their titles, though not confirmed, were to be suffered to retain the free and just possession; and those holding under sales or compromises after 1700 were not to be molested or disturbed.

"The title in the case of McMullen *v.* Hodge was extended, without requiring payment of the *media anata.* This was translated into the record without the payment of interest. The counsel for the appellee treated the *media anata* as a rent, to be paid half-yearly. But this seems to be a misconception. The *media anata* were not the rents payable half-yearly, but the half of the estimated income or rent for the first year; and they were chargeable not only on composition, but on all grants, titles, and offices whatever. In Law 4, Lib. 8, Tit. 19, of the Recop. de las Indias, the king speaks of the imposition of the *media anata* for the benefit of the public treasury, and that, by order of 22 May, 1631, it was to be paid on all offices and charges not ecclesiastic, paying for each office and grant the half of the income of the first year, and that this duty or tax was general and absolute, embracing even his own sons. And in the same law, rule 2, provision is made for the payment of the *media anata* in two installments, viz: One half on the delivery of the grant or office, and the other half within the year, extended in the Indias to one year and one half. (Treviño *v.* Fernandez, 13 Tex., 659.)

"In the Institutes of Aso and Manuel, as translated by

Johnson, (1 White, p. 86,) it is said that homage and military service were annexed to feuds, until the duty paid in view of military service, (*lanza;*) and the *annats* of the half year, ('*media anata,*') were introduced as equivalent to them. In a note is the definition of Palacios, that *lanzas* consist of a certain service in money, which the nobles and grandees pay each year, and the *media anata*, the sum paid for the title honor." (Treviño *v.* Fernandez, 13 Tex., 653–660.

I have thus given all that bears upon the titles in both cases, the texts of which will also be found under the head of "Composition," in Paschal's Digest of Decisions, p. 587, §§ 7022, 7035.

There is a concurrence in the fact, that the grant now under consideration was a grant in composition; that it was only usufructuary, the government still retaining the fee; that the Indians could not alienate the land, nor could they transmit it by inheritance; and in the last case it is agreed, that in the first the judgment was correct. Whatever of difference there might be in translating Spanish words or terms, such difference is non-essential in this case.

IV. William Alexander, the complainant's solicitor, in an affidavit on p. 101, seeks to escape the effect of the former judgment, by showing that Howard brought the suit within one year after the final affirmance of the judgment by the supreme court of Texas—thus seeking to bring the case within the Texas statute, which allows a second action by the same plaintiffs, against the same defendants, for the same land, within one year after the final judgment. (Paschal's Dig., arts. 5298, 5299, note 1146.)

But this statute has never been construed to mean that the defeated plaintiff may transfer, or covenant to transfer, the property to another, so as to bring the suit in a court whose jurisdiction is foreign to that of the State courts of Texas. And "the person claiming under him" cannot mean one who has only covenanted to purchase. Such transaction is a fraud upon the jurisdiction of this court, which will not be tolerated.

Alexander annexes to his affidavit a translation of the title, which, although not regularly in the record, may be consulted for the enlightenment of the court. On page 102, Alexander asumes that the condition of inalienability has been abrogated by the repeated changes of the government, thus leaving the title to the Indians capable of alienation, But this is the position for which Volney E. Howard contended in McMullen *v.* Hodge. And although we there conceded, that the Texas revolution had abolished the whole body of the Spanish laws, on which land titles rested, and therefore none, perfect or imperfect, had judicial standing unless recognized by the new government, the learned judge held, that as to perfect titles this was error; that they rested upon former laws and the humane principles of the laws of nations; and that the great body of the Spanish laws were retained by the schedule to the constitution of the republic of Texas of 1836:

"That no inconvenience may arise from the adoption of this constitution, it is declared by this convention, that all laws now in force in Texas, and not inconsistent with this constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation."

Upon which the following general decisions have been made:

"This section continued in full force all laws in force before the separation from the Mexican confederacy, which were not inconsistent with that constitution. (McMullen v. Hodge, 5 Tex., 34.) Or with the general policy. (Blair v. Odin, 3 Tex., 201.) Taking the 1st section of the schedule in connection with the 10th section of the general provisions, it would seem that the convention did not intend to destroy any rights or titles, except those enumerated and specially named. (See Kilpatrick v. Sisneros, 23 Tex., 125.) While the convention made no change in the existing laws under which colonists held their lands, they imposed other limitations upon the holders of large titles within the republic, with reference to the new order of things." (*Id.*) (Paschal's Annotated Digest, p. 34, sec. 1, note 139.)

But the title in this case had fallen to the ground with

the extinction of the missions; and certainly there is nothing in the Texas laws to recognize its continued existence. The history of these missions and their secularization, in 1795, is given in San Antonio *v.* Odin, (15 Tex., 540–543,) and in the case of McMullen *v.* Hodge, (5 Tex., 34.)

It will be seen in San Antonio *v.* Odin, (15 Tex., 543,) that the government assumed the ownership of all the mission property, and granted the churches to the chief pastor of the Roman Catholic Church, reserving all the lands, except that on which the churches stood.

V. The common law act of 20 January, 1840, abolished the whole system of Spanish law, "except * * such laws as relate exclusively to grants and the colonization of lands in the States of Coahuila and Texas." (Paschal's Annotated Digest, art. 804.)

This is no reservation in favor of the laws on which Spanish titles rest; and it is no recognition of titles which could not be alienated, because of the character of the persons who held them. Certainly it is no repeal of the conditions against alienation by Indians.

The act of 14 December, 1837, relinquishing certain conditions in colonists' grants, and ratifying and confirming certain titles, expressly limited the quantity to one league and labor. (Paschal's Dig., art. 795.) Indeed, it has always been construed to have had relation alone to grants to colonists.

And, finally, the joint resolutions of 26 April, 1836, asserting jurisdiction over the soil of Texas, positively asserted "that we recognize no title in the Indian tribes within the limits of the State to any portion of the soil thereof." (Paschal's Dig., art. 441.) This resolution was passed with direct reference to the articles of annexation, which declared that Texas "shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment and liabilities of the said republic of Texas, and the residue of said lands, after discharging

said debts and liabilities, to be disposed of as said State may direct." (*Id.*, p. 44.)

VI. The opinion of the Texas government in regard to titles of Indians may be found in the fact, that at an early day the government of Mexico made to a band of the Cherokees (in the names of Fields, Bowles, and others) a large grant of land. This grant was in due form. During the progress of the revolution the subject of this grant became one of anxiety to that powerful tribe and to the revolutionists. In article III of the plan and powers of the provisional government, the governor and council were given the power to treat with the several tribes of Indians concerning their land claims, and, if possible, to secure their friendship. (Paschal's Dig., p. 25, art. III.) On the 22 December, 1825, authority was given to General Sam Houston, John Forbes and John Cameron, to treat with the Cherokee Indians and their twelve associate bands. Among other resolves in the instructions to the commissioners was one, that the Indians should never alienate their lands, either separately or collectively, except to the government of Texas; and one authorizing them to exchange other lands within the limits of Texas, not otherwise appropriated, in place of the lands claimed by the Cherokee Indians and their associate bands. (Journals of the Consultation of Texas, pp. 194, 208.) The treaty made by these commissioners recognized the grant to the Cherokees and other bands, as derived from the same source under which others held.

Yet, in the Constitution of 1836 and the subsequent legislation of the republic, these Indian titles were not recognized. And on 27 January, 1844, congress abolished the Cherokee reservation, and provided for sectionizing and distributing the Cherokee lands. (Hartley's Dig., art. 2092; Paschal's Dig., art. 4547, note 1005.)

Thus the Indians, without any regard to the forms of their titles, have ever been treated in Texas as mere tenants at will; as in fact having no interest in the soil, except

a usufruct, subject to termination by abandonment, by appropriation, or in any other manner which the government should elect.

Therefore the general principles and practice of the Government have been consistent with the rulings upon this very grant. And those precedents render it legally impossible that a few of the supposed descendants of a family of Indians, connected with a mission for the purposes of instruction in the principles of christianity, to which mission had been granted the use of certain lands for purposes connected with that mission only—a mere usufruct, limited in its nature and terms—nearly a century after the date of the license, could convey a title in fee to a citizen of a Republic whose constitution and laws recognized no rights in Indians.

The practice of Texas in regard to the Indians is in accordance with the Spanish law, and the law and practice of the continent.

By royal decree, dated 23d February, 1781, relative to the sale and alienation of lands belonging to the Indians, after reciting at length the great abuses which had resulted from the toleration of this practice, it is substantially declared, that the Indians, of whatever condition or class, civilized or not, in communities or individually, are absolutely prohibited from selling, alienating, or leasing their land, whether the title was derived by purchase, inheritance, donation, or otherwise; and that every alienation in which they had an absolute and fee-simple title was null and void, and that the alienee lost the price of the sale or lease; that the lands which the Indians received by distribution were absolutely lost to the alienor and alienee, and the same were directed to be applied to others; that in the lands which the "natives received by distribution they have no direct dominion, but only a beneficiary interest;" and that the "lands held by Indians in community are distributed to them for the laudable and pious purpose of their habitation, benefit, and condition." (*Ordinanzes de Tieras y Aguas*, pp. 161–169.)

This decree was transmitted through the vice-royalty of Mexico, and it may or may not have been in force in Louisiana and Florida. But, be this as it may, it was expressly ruled by this court, in the United States *v.* Mitchell, (9 Pet., 745, 746,) that "individuals could not purchase lands from Indians without the permission or license from the Government, the crown, colonial governor, or according to the rules prescribed by the colonial laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete."

The effect of alienation by an Indian where it was forbidden has been ruled in Conaleskee's case, a Cherokee Indian, (Kennedy McCartney, 4 Ala., 142;) and in the University of Alabama against Winston, (5 Stewart & Porter, 17;) Gill *v.* Taylor, (3 Porter, 182;) Cromilin *v.* Minturn, (9 Ala., N. S., 594, 600;) St. Dennis *v.* Drum, (19 Johns., 127;) Jackson *v.* Goddell, (20 Johns., 188;) Murray *v.* Woodson, (17 Wend., 531.) The case last cited holds that the Indians have no direct dominion in the lands distributed to them, and that they were positively prohibited from alienation. The Alabama cases hold that when the Indian reservation was subject to forfeiture by the happening of some future event, if the event occur, no act is necessary to revest the estate in the Government. (9 Ala., 600, 601;) Kennedy *v.* Moreland, (4 Porter, 155–158.)

There is a long series of decisions of this court, which hold the same doctrines. The Indian title in all this country is but a usufruct. As an Indian, he holds subject to the will of the Government, and can only alienate when the law allows it; and as communities, they can only alienate to the Government. (Cherokee Nation *v.* Georgia, 5 Pet., 1; Worcester *v.* Georgia, 6 Pet., 515; United States *v.* Rogers, 4 How., 567; The Kansas Indians, 5 Wall., 737; Johnson *v.* McIntosh, 8 Wheat., 574; and, finally, the Cherokee Tobacco Case, (Boudinot,) 11 Wall., 619.)

These and many other cases settle the general principles that, since the bull of Pope Alexander VI, no right in

fee to lands has ever been acknowledged in Indian tribes; that they have been treated as children or wards; that their occupant rights alone have been protected; that they have no power of alienation, except at the pleasure of the Government, and generally to the Government; that when reservations of lands have been allowed to particular Indians, they have usually been with restrictions against alienation; and when alienated despite these restrictions, the acts have amounted to forfeitures to the Government, and the vendees took nothing.

The general principle in Texas is, that where alienation is forbidden by law, the acts which attempt it are nullities. It has been thus stated by the Supreme Court:

"By the Code Napoleon, one of the conditions essential to the validity of every contract is lawful cause. (p. 304.) The cause is unlawful when it is prohibited by law; when it is contrary to good morals or public policy. (p. 309.) Same doctrine, (1 Pothier, 62) In Partidas 5, Tit. 11, Law 28, it is said that every contract made contrary to law or good morals, though under a penalty of an oath, ought not to be observed; thus holding the obligation not to violate the law paramount to that imposed by an oath. At common law, whatever is contrary to public policy invalidates a contract. Trading with an alien enemy is against public policy, and renders the contract on such traffic void. Mr Chitty says, 'that not only is an alien enemy not able to sue in this country, on a contract made by him, but the contract is not available, even against him, in favor of an Englishman, though made abroad; and, being void, if made during the war, the return of peace does not afford the latter any ground of action; but the right of action is only suspended until the return of peace, if the contract was made before the commencement of the war.'" (Chit. on Con., 3 Am. ed., 51.)

"The principle to be deduced from the authority last cited is, that for certain causes the enforcement of a contract may be suspended without invalidating the contract; and, further, that if the impediment to contracting exist at the time it is entered into, it invalidates the contract, even after the removal of the impediment. But the current of authority is now destructive of any such distinction, holding all contracts against law alike invalid. (Chit. on

Con., pp. 230, 231; Gallina *v.* Laborie, 5 Term, 242; Bensley *v.* Bignold, 5 B. & A., 335.) My object in referring to the last authorities is, to show that in the English courts there is no longer any distinction between a law merely forbidding an act and one forbidding under a penalty. The same authority will show, that the distinction once attempted between things *mala prohibita* and *mala in se* cannot be sustained: that either invalidates a contract."

"It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. (Craig *v.* Missouri, 4 Pet., 430.) The chief justice refers to the case of McElvea *v.* Hayter, 2 Port., Ala., 145; Armstrong *v.* Toler, 11 Wheat., 528; Springfield Bank *v.* Merrick, 14 Mass., 322; Hunt *v.* Knickerbocker, 5 Johns., 327; and held that the Missouri loan office certificates, being bills of credit, which the States are forbidden to issue, were nullities, and the loan of them was no consideration for a note. (Hunt *v.* Robinson, 1 Tex., 758–760.)

"It makes no difference that the laws have been since repealed, or that the war has since ceased; for, the contract being clearly in fraud of the *law existing at the time*, the execution of it ought not to be enforced by the courts of the country whose laws it was intended to evade. (Story's Confl. of Laws, § 205; Hannah *v.* Eve, 3 Cranch, 242; Mitchell *v.* Doggett, 1 Fla., 356; Hunt *v.* Robinson, 1 Tex., 762.")

And so it was ruled in Desmuke *v.* Griffin, 10 Tex., 115; Clay *v.* Cook, 10 Tex., 72; Robbins *v.* Robbins, 3 Tex., 497. Therefore, if it were possible to impair the decision in relation to the original grant, the plaintiff could not have derived title from the descendants of the Indians, for whose use the grant was made.

VI. It may be proper to notice matter in this record which is not properly brought here by appeal, although such matter can in nowise influence the decision.

By examining the prayer of the bill (p. 4) it will be seen that the relief sought was that "the locations, surveys, and patents made within the limits of your orator's tract or

parcel of land aforesaid may be determined and held to be void, and thereby the cloud impending over the title of your orator may be removed; or that, after the establishment of the right in such manner as this court may direct, by a final decree to be then rendered, your orator may be quieted in his title and possession aforesaid, and all obstruction to the full and peaceable enjoyment of his property removed; or that, if your orator is mistaken as to the special relief hereby asked, such other or further relief be extended to him, or decree rendered in the premises, as the nature of the case may require." (pp. 4, 5.)

The decree rendered upon this prayer is beyond the relief sought, and certainly beyond the power of a court of equity. It is that the complainants "*recover of said Samuel A. Maverick and John H. Herndon the tract of land in the original bill described*, and that their (the complainants') title to the same is hereby declared to be free from all clouds cast thereon by the defendants, and *all persons claiming or to claim by, through, or under them.*"

Then, after describing the boundaries as in the bill, the decree proceeds: "It is further ordered and decreed, that all patents, locations, and surveys obtained or owned by said defendants Maverick and Herndon, which are in conflict with the title of complainants, *which is decreed to be a good title*, are, and are hereby adjudicated to be, null and void, *and that said defendants shall cancel and remove the same.* It is further decreed, that a reference is hereby ordered to be made to Matthew Hopkins, Esq., as master in chancery in this court, to ascertain and report to this court, at as early a day as may be practicable, all the material facts sought to be discovered by said complainants as against the defendants aforementioned; and that he be empowered, if necessary, *to examine said defendants on oath by interrogatories addressed to them*, to the end that such additional decree may hereafter be entered as to equity may seem meet."

I have italicized those parts of the decree which are entirely beyond the case made by the bill, beyond the

power of a court of equity; which have the extraordinary feature of declaring a title to be good which the decree and the whole proceedings show was not proved, either by original title, as stated, or by copy, or in any other manner as prayed; which decrees against all purchasers, under the defendants, irrespective of the dates of the purchases; which requires the defendants to cancel their own patents, locations, and surveys upon a tract of land about which the complainants had averred with entire uncertainty, and about which nothing was proved; and finally, without proofs, it is referred to a master to ascertain these gross uncertainties, and, if necessary, to examine the defendants by "interrogatories," which could only have issued from the court upon a proper case made and proved for discovery.

Upon a decree so far beyond the case made by the bill, the prayer, and the powers of the court, it is not wonderful that we find the master proceeding upon nothing but the public records. On the 7th of January, 1867, however, he reports that in the month of April, 1861, the defendant, Herndon, had paid $56 73, which is beyond any amount which could honestly be taxed against him under the order of 30 January, 1861, (pp. 33, 45,) and the payment of odd cents shows that it was all with which he was charged. So that upon the law and the facts, the taking Herndon's answer from the files, and putting him in default, was not only an irregularity, but a gross fraud. The master, however, states (p. 42) that "the defendants being in actual, as well as constructive contempt, having failed to answer and to comply with the orders of the court previously made, not being entitled to notice," and hence he says he gave them none. An execution on pages 46–48 develops, that the whole costs taxed (including $250 allowed the master) was $582 89, which this same master credits with the $56 73 paid by Herndon. Considering that the complainant joined eleven defendants, most of whom were served with process, at great expense of mileage, against whom he afterwards voluntarily discontinued, and that seven heirs of McMul-

len were made parties and answered, for which and sundry other costs of revivor these defendants could not be responsible, it is hard to see the propriety of this taxation against two defendants, one of whom was served and answered, and the other made default, without incurring any costs. Passing this gross abuse, the point is that the complainants elected to take execution, and did it, (pp. 47–49;) therefore there could be no question about contempt for the nonpayment of costs, and certainly there was no contempt in failing to answer.

Under the taxation annexed to the execution, the complainants' solicitor seems to have seen the gross impropriety of taxing two defendants with all the costs made against sixteen others, against whom there had been discontinuances, so he indorses the control of the execution to "Russell Howard; signed William Alexander, late solicitor for complainants."

It seemed to him proper to retire just at that point. And, with wonderful benevolence, on page 101, Alexander swears that he had relinquished his fee for services against Maverick. After Alexander retired Howard grew active, and on page 50 we find him swearing out a proceeding for attachment for contempt against sundry strangers to the record, made against Masterson, Herndon's assignee. (pp. 51–55.) When Howard comes to swear against Maverick, he produces some fine historical and literary reading, although its pertinence is hard to see, except that it is an attempt to bring sundry strangers to the suit into contempt. (pp. 57–60.)

The strangest part of the matter is, that sundry of these persons were attached for a contempt. (pp. 65–72.) These gross singularities need not be pursued. They show not only an abuse of right, but also an abuse of the decree itself. They led to an effort on the part of Maverick to show cause why he should not obey a decree, which he swears was obtained by fraud. (pp. 72–77.)

It is in answer to this fierce assault that Alexander swears to his notions of the title, and brings the same copy into

the record, which had been used in the suit of McMullen *v.* Hodge, (5 Tex.,) and which has already been noticed. Maverick's effort to open and review the decree failed; but there seems to have been no final order upon it.

VII. If the title be properly in the record, and were it before the court upon error, no different conclusion could be reached than that arrived at by the supreme court of Texas.

On 9 February, 1764, Domingo Castello petitioned the local authorities at San Antonio, setting forth that he had made a settlement upon the San Lucas lands, and he denounced them as vacant, (p. 113;) to which fact a number of parties certified.

Ambrosio Zebalos, as attorney in fact for Castello, on the same day, in due form, petitioned for the land. (pp. 113, 114.) On 3 April, 1764, the paper was passed to the attorney general, Don Franco Antonio de Echavarri Caballero, of His Majesty's Council of the Royal Audience in New Spain, and primitive judge of sales and dispositions of lands and waters, (p. 115.) On the 13th of the same month, a decree was entered that the land be sold to the highest bidder, and the whole facts, including the interests of any community of Indians, should be referred back to the government of Mexico. This dispatch was presented on 23 January, 1765, to Bernave Carabajal, who ordered witnesses to be examined as to the claims of Castello. These witnesses did not sustain Castello's claim to the San Lucas lands, but proved them to be vacant. (pp. 116–122.)

On 28 January, 1765, the Friar Pedro Ramires de Brellano, president of the missions belonging to the College of Our Lady Guadaloupe de las Zacaticas, minister in the province of San José, in a petition to Carabajal, and by way of intervention, set forth, that "this mission has the first and best right to said lands, forasmuch as without them they cannot maintain their stock, which would have to be driven into the wilderness, where the Indians would be exposed to dying, without the benefit of clergy," &c.

And he continues, that although it was not proved that the land belonged to the mission, it was because it was not designated in its foundation; for these were established under general laws, which allowed all the lands necessary for pasture and agriculture; and that the governor, Don Angel de Matros, of Navarette, had expelled Castello from these lands as a trespasser.

The friar prayed for a reference of the matter to the primitive judge, and, in the mean time, he protested against any action which might be prejudicial to the use of the lands by those Indians. (pp. 123, 124.)

Notice was given to the Indians of San José to be eye-witnesses of the survey of the land. Against this the friar protested, until the decision of the primitive judge should be known. The survey was ordered and executed, (pp. 125–127.) and notice of sale given for thirty days, at which the Indians, by their agent, Don Bernardo de Miranda, became the highest bidders for one hundred dollars.

The several acts of Carabajal were reported to the primitive judge.

The intervention of the holy friar is again set forth in a very strong paper on pp. 132–135.

The attorney, Martin de Aramburo, on p. 136, decides that the "Indian communities must have the preference in the disposal of lands, as is provided in the 19th Law, of Title 12, Book 4, of the Recopilacion;" and he recommended that the action of Carabajal be approved. The opinion of the attorney general was sanctioned by De Echavarri and the council. (pp. 136, 137.)

The language of the decree or grant runs thus:

"Mexico, *November* 18, 1776.

"In consideration of the foregoing acts, I do hereby order, that the mandates of their lordships of the Royal Audience, and in conformity that the sum of one hundred and fifty dollars be made in the Royal Treasury *without interest*, [in mediata anata,] on account of being Indians of the population of the Mission of San José, to whom the sale of eleven leagues of land is approved, and the same is granted to them, by way of sale, for their labors, pas-

tures, &c., and other purposes, without the right of alienating, ceding, or selling any part thereof, without the express license of the superior government of this reign, under the penalty of annulling this sale, without prejudice to His Majesty or to a third person; and upon the payment of the said sum of one hundred and fifty dollars, from which will be deducted twenty, viz: two per cent. on account of one thousand dollars, the title will be given, with a copy of these acts, to the letter.

"This is ordered by Don Franco de Echavarri, Knight, &c., &c., &c.

"Sealed and delivered before me,

"PEDRO LORENZO DEL VALLE,

(p. 138.) "*Royal Secretary.*"

The original title in Spanish is not in the record, but I find the latter clause translated by Judge I. A. Paschal, who was an accomplished civilian and Spanish scholar, in these words:

"And is made to them (the Indians of the population of the Mission of San José) 'a gift of them,' (the eleven leagues of pasture land,) 'by way of sale, for labors, pastures, rearing of cattle, and other necessary purposes, without being permitted to alienate or sell any part of the lands, except with the express license of the Superior Government of this Kingdom, under pain of nullity of this gift, without prejudice to His Majesty or a third person.'

"It is said that the expression 'without prejudice to His Majesty or a third person' has reference to the penalty pronounced; that is, that the nullity should be without prejudice to His Majesty or a third person. It is the gift (*mercéd*) which is made without prejudice to His Majesty or of a third person.

"It is a universal rule, in all Spanish grants, to insert the clause, without prejudice to a third person; and as this was a mere tenancy at will, the same clause was reserved in relation to the grantor. If we supply the word 'and,' and punctuate differently, the sentence will be perfectly clear. 'And is made to them a gift, &c., for their labors, &c., without the permission of alienating, ceding, or selling any part of said land, except with express license of the Superior Government of this Kingdom, under pain of nullity of this gift, 'and' without prejudice to His Majesty

or a third person;' that is, the gift was made without the power of selling, and without prejudice to His Majesty or a third person. It is susceptible of no other construction. The sale itself annuls the gift."

The law to which reference has been made necessarily inhered to the grant, and it defined the character of title. That title, upon its face and in the law, was a mere usufruct, and not a fee; in other words, the sovereign did not part with the soil, and something remained to be done to complete the title when a change of sovereignty took place, and the character of such an equity has been defined by a series of decisions in this court and in the Supreme Court of Texas.

A concession or imperfect title, at the time of the conquest, is only a charge upon the conscience of the body politic. Until recognized by the new political sovereignty, it has no, *proprio vigore*, standing in court, but remains a dormant right. (Smith *v.* The United States, 10 Pet., 332; Buyck *v.* The United States, 15 Pet., 215; O'Hara *v.* The United States, 10 Pet., 275; United States *v.* Delespine, 10 Pet., 319; United States *v.* Miranda, 16 Pet., 153.) There are later decisions of this high tribunal, in which they assert in emphatic terms that no standing can be given in courts of justice to inchoate claims under the former government of Louisiana and Florida until recognized by the political authority of the United States. (Choteau *v.* Eckhart, 2 How., 344; Byrd *v.* Montgomery, 6 Mo., 514; Mackay *v.* Dillon, 7 Mo., 10; Barry *v.* Gamble, 3 How., 56; Les Bois *v.* Brammel, 4 How., 459; The United States *v.* Lawton, 5 How., 28; Menard's Heirs *v.* Massey, 8 How., 293; Stoddard *v.* Chambers, 2 How., 285; Mills *v.* Stoddard, 8 How., 345; Trimble *v.* Smithers, 1 Tex., 806–809.) It is no longer an open question, that an imperfect title, emanating from a former and unrecognized by the existing government, forms no foundation for an action. (Paschal *v.* Perez, 7 Tex., 366.)

An order of survey and survey, under the colonization laws, was not "evidence of right to land that has been recognized by the laws," which, *proprio vigore*, could have any

standing in court. The right was inceptive and inchoate, the title remained in the sovereignty, and it required some action of the political authority to consummate it. (Jones *v.* Menard, 1 Tex., 782; Paschal's Digest of Decisions, §§ 7062–7064.)

The most that can be said is, that the right was a franchise or incorporeal hereditament, which was intended to be enjoyed by the people of the mission as long as that endured; and it returned to the sovereign whenever the mission ceased to exist. This view was argued by counsel, and so it was held by the supreme court of Texas in McMullen *v.* Hodge, 5 Tex., 43–45; 65–69, 86.

Were this an original case, it would be impossible to uphold the title.

As in this painful altercation the title on which the decree rests has been fully disclosed, we ask that the judgment be reversed, and the court below be directed to dismiss the bill.

Respectfully submitted,

GEORGE W. PASCHAL.

Supreme Court of the United States.

BRANCH T. MASTERSON, *et al.*
v.
VOLNEY E. HOWARD, *et al.*
No. 169.

When this cause was argued, it was urged by the defendant in error that the *pro confesso* order of January, 1861, which was final in form, not having been appealed from, Maverick was not properly before the court, although he appealed from the final decree of June, 1866 in which he was included.

But since that argument, the case of Frow *v.* De La Vega, 15 Wall. 554, has decided this very point. In their structure, object, and theory, and the fact that the holder of one large grant of land included several locators of different parcels of the same grant in the same bill, the two cases are very similar. But the principle decided in Frow *v.* De La Vega is general; and it disposes of the order of January, 1861, in this cause.

Mr. Justice Bradley said:

"The true mode of proceeding, where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence; he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a

final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. This was so expressly decided by the New York court of errors in the case of Clason *v.* Morris, 10 Johns. 524. Spencer, J., says: 'It would be unreasonable to hold that because one defendant had made default, the plaintiff should have a decree even against him, where the court is satisfied, from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree.'" (Frow *v.* De La Vega, 15 Wall. 554.)

The same practice exists in Texas, where the decree was rendered. It is there said:

"There should be but one final judgment in a cause, (Paschal's Dig. art. 1450, n. 555,) from which an appeal or writ of error can be taken; otherwise there might be as many final judgments and appeals in the same cause as there are defendants." (Martin *v.* Crow, 28 Tex. 615.)

Viewed in the light of these decisions, and of the cases of Whiting *v.* The Bank of the United States; Marchand *v.* Girod, 4 How. 503, and Merle *v.* Andrews, 4 Tex. 208, the defaults and decretal orders against a part of the defendants, whatever may be their form, are but interlocutory, until such decree is rendered, as would enable all the defendants to appeal, and thus to give jurisdiction to this court.

Maverick had no right to appeal from the order of 1861; and as that order in law and in fact was merged in the decree of June, 1866, his appeal was timely prosecuted.

Therefore, whatever may become of the motion of the assignee of Herndon, we ask a consideration of the merits of the other grounds in our brief.

GEO. W. PASCHAL,
For Masterson.

Supreme Court of the U. States

December Term, 1872.

BRANCH T. MASTERSON, *Assignee in Bankruptcy of* JOHN H. HERNDON *Bankrupt, et al, Appellants*

vs.

VOLNEY E. HOWARD, *et al.*

Brief of Counsel of Appellees.

The first question for consideration in this cause grows out of the condition of the pleadings and proceedings thereon in the Court below as they appear of the record.

An analysis thereof show :

I.

1. The Bill (Rec. p. 2) and subpœnas duly served upon the defendants to the original bill.

2. Bill of Revivor (Rec. p. 15) and subpœnas duly served on the defendants thereto.

3. Decree pro confesso against defendants served (Rec. p. 23.)

4. Agreement and order to set aside decree pro confesso as to Herndon on the conditions substantially of the 19th Rule of Practice in Equity.

5. Agreement Rec. p. 24 and order giving leave to file supplemental bill and reviving suit and filing thereof, (Rec. p. 25.)

6. Decree pro confesso against Herndon and Maverick, (Rec. p. 30.)

7. Motion of Herndon to set aside decree pro confesso, (Rec. p. 31.)

8. Order to set aside decree pro confesso as to Herndon, on payment of all costs of plaintiff in the cause, and decree made final as to Maverick, January 30, 1861, (Rec. p. 33.)

9. Answer of Herndon, filed (Rec. p. 34.)

10. Motion to strike out answer of Herndon as filed improvidently and in contempt of the order of the Court, (Rec. p. 38.)

11. June 20, 1866. Answer of Herndon being filed in contempt, ordered to be stricken from the files and the decree pro confesso taken against him on the 4th of March, 1861, confirmed and made final as to said Herndon and others, (Rec. p. 39,) of all of which said Herndon and Maverick had notice, as appears by the stipulation, (Rec. p. 24.)

12. Masters' report, filed December 3, 1866, (Rec. p. 40.)

13. Confirmation of Masters' report, February 26, 1867, (Rec. p. 46.)

14. Decree refusing leave to file a Bill of Review, March 18, 1870, (Rec. p. 151.)

This shows laches on the part of Herndon and Maverick of such gross character, as can only be accounted for upon the supposition that they did not intend to defend the case, and in fact, the record shows a statement to that effect made by Maverick.

Both Herndon and Maverick were in contempt of the Court and were so adjudged. They never purged themselves of their contumacy.

The original and supplemental bills contain the facts upon which said decrees pro confesso and final decrees

were rendered, and the relief granted thereby was, substantially, no other nor greater than that asked therein.

The discretion of the Court below was exercised with moderation; there certainly was not such oppression or abuse of its discretion as would require the interference of the Appellate Court.

1 Daniels' Chancery Practice, 517.

Bank of United States vs. White, 8 Peters, 262, 18th and 19th Rules of Practice in Equity.

2. As to the defendant Maverick, the decree pro confesso against him was made final by the decree of January 30, 1861, (Rec. p. 33.) This was as complete, final and binding upon Maverick's rights and titles as the decree of June 20, 1866, which merely recites it in terms. Maverick's appeal is thus barred by the limitation, after deducting the time of the war in Texas as established in the case of the Protector, 12 Wall, 700, as controlling the limitation, the war began in Texas, 19th of April, 1861, and ended August 20th, 1866. The appeal was brought June 12th, 1871. More than five years had elapsed, during which an appeal could legally, have been brought.

3. The decree of June 20, 1866, Rec. p. 39, was against Herndon, Maverick and McMullen's heirs; the latter have not joined in the appeal, and no sufficient reason for the non-joinder has been shown.

Masterson vs. Herndon, 10 Wallace, 416.

4. This appeal is taken from the decree entered June 20, 1866, as will appear by the appeal bond, Rec. p. 180.

It is a question whether that is a final decree from which an appeal will lie.

That decree, Rec. p. 40, among other things provides, "that a reference is hereby ordered to be made to Matthew Hopkins, Esq., as master in chancery in this Court to ascertain and report to this Court at as early a day as

may be practicable, all the material facts sought to be discovered by said complainant, &c."

Afterwards, on 3d day of December, 1866, said Hopkins filed his report, Rec. p. 40, and on 21st of February, 1867, a decree confirming the report was made by the Court. From this no appeal has been taken.

Forgay vs. Conrad, 6 How. 204. Thomson vs. Dean, 7 Wall. 342. French vs. Shoemaker, 12 Wall. 86.

5. It is claimed by the appellants, that this case was decided by the Supreme Court of Texas, in the case of McMullen vs. Hodge, 5 Texas Rep. p. 34. No answer being on file, there is nothing by which this can be tried. That case is not identical with this in the following particulars:

1. The land in controversy in that was only one labor (177 acres,) in this eleven leagues the parties to that are not parties do this, neither to the original defendants in this claim under the Defendants in the former. Watson vs. Jones, 13 Wall. 679.

2. The decision in McMullin vs. Hodge, 5 Texas Rep. p. 34, does not "establish a rule of property in the State Court, which will be followed by this Court," because it has been doubted, explained and in part overruled by the Supreme Court of Texas, in the latter case of Trevino vs. Fernandez, 13 Texas Rep. p. 630.

3. Even if the case of McMullen vs. Hodge in 5th Texas were identical with this, the plaintiff or parties claiming under him have by special statute of Texas, the right to commence a new action for the same property within one year after final judgment. Articles 32 and 33, p. 972 of Haitley's Laws of Texas.

The present action was brought within one year after the affirmance of McMullen vs. Hodge. Rec. p. 101.

6. As to the validity of the decree of June 20, 1866, it is sufficient to say that by the President's proclamation of June 17, 1865, the district judge for the district in which

Texas was included, was thereby ordered to hold Courts in accordance with the provisions of the act of Congress. Also the proclamation of the President of August 20th, 1866, shows that the insurrection in Texas was suppressed and ended before said 20th of June, 1866.

The Grapeshot, 9 Wall. 132.

Texas vs. White, 7 Wall. 700.

7 No evidence was introduced at the hearing of the cause. The translated copy of the title was attached as a mere exhibit to the affidavit of Wm. Alexander, Esq., in the matter of the motion to file a Bill of Review, &c.

Upon the points, and for the reasons above assigned it is considered that this appeal ought to be dismissed, without argument upon the title of the land involved in this cause, but out of abundant caution, the argument for the McMullen title in 5 Texas Rep. is adopted, denying, however, that said title was a tenancy at will, and citing additional authorities and especially refering to the opinion of the Supreme Court of Texas in the case of Trevino vs. Fernandez, 13 Texas, 630, as explaining, modifying and partially overruling the decision in McMullen vs. Hodge, 5 Texas, 34.

VIII.

1. It appears that the lands claimed by Castillo and the Indians, were duly put up at sale at public auction, being first valued according to law. In both methods of disposition this was the rule of proceeding. The only question is, whether the lands were disposed of by composition, so called, which it appears, under Law 15, Tit. 12, Lib. 4, of the Laws of the Indies, (2 White, 53,) rendered the purchaser a tenant at will. It should be observed that that law is not referred to, in any part of the proceedings, as furnishing the rule under which this grant was made. On the contrary, the only law referred to, is 19 of the same Book and Title, referred to by the Royal Attorney,

as giving the Indians the preference in the disposition of lands, whether by sale or composition, Admitting for argument sake, that the law referred to speaks of composition and not of sale, yet a mistake of the purport of the law, by the attorney, could not effect the character of the sale actually made. The law is as follows: "No one "shall be admitted to make composition of lands, who "shall not have been in possession thereof, for the term "of ten years, although he should state that he is in pos- "session at the time; for such circumstance, by itself, is "not sufficient, and communities of Indians shall be ad- "mitted to make such compositions, in preference to "other private individuals, giving them all facilities for "that purpose." (2 White, 54.) We should further observe that in the very preceding sentence to his reference to the law, the attorney states that there was no contest which required proof; that the lands were vacant, as decided by the Cabildo; evidently meaning, that not having been occupied ten years, as the law required, they were not subject to composition. Neither did the Indians nor Castillo come within Law 15, so as to subject the land to composition. We must therefore presume that the attorney referred to this law, 19, either to prove that Castillo had no right, if the lands were admitted to composition, or to show what was in fact the law of the Indies, that the Indians were preferred in all manner of sales and compositions of lands. (Law 9, Tit. 12, Lib. 4; 2 White 51; Law 36, Tit. 18, Lib. 2; Law, 13, Tit. 31, Lib. 2; 2 White 34.) Whether or not the opinion of the attorney was that these lands should be admitted to composition, the decree of the officer, authorizing and directing the grant, is made by sale according to the 9th schedule of the instructions or decrees of 1754, which is much later than the above decrees promulgated in the laws of the In-

dies in —— and directs under what circumstances the Audiencia may confirm sales and dispositions. This tribunal did confirm this grant "by way of sale" for the additional sum of fifty dollars, over and above what the lands had been struck down for, to the Indians; and directed the secretary to extend the title. This title was extended "by way of sale, for labors, pastures, &c., and other purposes." There is no doubt the Royal Audiencia with the Primitive Judge had a right to sell lands; and might sell instead of admitting to composition. Sale was more favored in the law, (2 White, 55.) As to the power of the Audiencia, see Sec. 9, 10, 11 of the Royal order of 1754, (2 White, 65) which was indeed almost unlimited, representing the King himself.

The Supreme Court of the United States have always presumed in favor of the face of the grant, and the power of the officer making it. In Lucas vs. Strothor (12 Pet. R. 411) they declared that if a Spanish grant is contrary to the written order of the King, it shall be presumed to be according to some other order not known. The King, as legislator, may change the laws, and his officers are presumed to know these changes, and to act within the scope of their powers, and according to their duty. (7 Pet. R. 95.) If then, under the law, this land might have been admitted to composition, but the Audiencia had power to sell, and did pass title by way of sale, there is no doubt that such is the real character of the title. And even if the Audiencia, having jurisdiction of the subject, decided wrongly, and disposed of the land by way of sale, where it should have given title by composition; yet as it was *res judicata*, it would render it a title by sale. We know affirmatively, that that tribunal had a right to grant lands by sale, and to confirm sales; and if we did not, having exercised the right, the law presumes, not only that it had

the right, but that the Spanish Government always had some officers in the Colony, who possessed the power. (6 Pet. R. 760; 9 Pet. R. 760.

The authorities granting the land, having directed that the conditions should be incorporated in the title, we are to presume that all the conditions were embraced, and that so vital a condition and qualification of the title as that of being tenants at will, was not omitted. Such an interpretation would be forced, and contrary to the well settled rules of construction. "The rule to be collected from all the "cases is, that the intention of the parties, as disclosed "by the words of the instrument, must govern the con- "struction." (Pool v. Bentley, 12 East, R. 168; 1 Mass. R. 227; 4 Id. 136; 6 Id. 24; 7 Id. 382; 1 Kent 460 (note *b*) last Ed.; 2 Id. 556.) In the case of the United States v. Bernardo Segui, 10 Pet. 306, it was decided that no conditions in law would be attached to Spanish grant, absolute in form; inasmuch as the officer granting was the judge of the conditions, and had embodied none in the grant. So here, the Audiencia was the tribunal to decide whether the confirmation should be by composition, or by sale; and having made it by sale, the face of the title cannot be contradicted by holding it to have been by composition. The Supreme Court of the United States in adjudicating Spanish grants, have never implied conditions in law, when none were expressed in the grant. The well known habits of the Spanish authorities, of setting down in the title the precise conditions on which the government intended to rely, forbid any such assumption, especially when connected with the fact, that the officer had power to grant with or without conditions, at his pleasure. The case of the United States v. Rodman (15 Pet. R. 130) is in all respects, a case in point, upon this branch of the subject. There the grantee presented a petition to the Governor, stating his losses, and services to the government, and his

intention to better his condition by erecting a saw-mill; and prayed for a grant of land. The Governor. in his decree, noticed his services and the advantages to result to the home and foreign trade of the province; and then gives the grant, according to the Royal order of 1790, for five miles square, in absolute property. It was objected to this grant: 1st, That it was void, because it did not conform to the order of 1790; and 2d, That there was implied a condition that a saw-mill should be built. It was admitted that the order of 1790 did not justify grants of the size made, but the Court said that as the Governor by law had authority to make larger grants, the mere recital of the order could not limit or prejudice the grant; the officer having sufficient power. As to the saw-mill, the building of it, not having been carried into the decree, as a condition, it could not be held a condition of the grant. How then can it be contended that in the case at bar, the mere reference by one of the attornies. to the law of composition, if such be the reference, can make this grant a title by composition. According to the case of Rodman the recital of the law of composition in the decree itself, would not make it a title by composition, where the grant itself declares it to be a title "by way of sale." The breadth of the title is to be measured by the granting words, and not by the recital of laws and things which do not enter into the conditions of the grant. So, where the petitioner reciting his services, asked for a grant of five miles square of land to build a saw-mill on and it was granted, the decree reciting the inducement, the building of the mill, without making it a condition expressly, the Court refused to imply one. (United States v. Hanson; 16 Pet. R. 196.)

II, Such being the nature of the grant, for whose benefit was it made and to whom was it granted? Not to the

church. Not to the Friars of the order of Gaudeloupe. After the first application for the two leagues, which was not listened to, they appear to have withdrawn from the contest. At the public sale the Indians of the Mission of San Jose appear as ordinary purchasers and bid the highest price for the lands; and they are struck down to them and subsequently confirmed to the "Native Indians" of that Mission "by way of sale." They are purchased by onerous title with the private property of the Indians. These lands cannot be held the property of the church or Mission, without holding that the Indians and the church were one and the same thing. Now, these lands formed no part of the foundation of the Mission, which held no lands for pasture, in right of property, but only a general right to use the vacant lands; the Mission having no particular charter, but being organized under general laws. The grant shows that it was the intention of the Audiencia to confer these lands, by sale, upon the Indians, in private property, separate and apart from the Friars and the church. The statement of the officer of the church in Mexico shows that the Mission, as an establishment, had withdrawn all pretention, and that all difficulty was removed by the Indians, as a community, becoming the purchasers.

That the laws of Spain gave a right to Indians to purchase and hold property, both as individuals and communities, cannot, at this day, be a matter of doubt. (2 White 34; Id- 51, 54.) Such a right is repeatedly and fully recognized by the laws of the Indies, which not only gave the Indians the right to purchase and hold, but gave them a preference over others. They were the favored subjects of the law. And even if we did not find in the laws of Spain, this express recognition of the right, we should be bound, in absence of contrary proof, to presume it. It is

a familiar principle, that the Courts will indulge all presumption in favor of the validity of a grant, made by an officer having the power; and he who alleges the invalidity of a grant, takes upon himself the burden of proof, and must show it. (Phillips v. Robertson, 2 Tenn. R. 420: Patterson v. Jenks. 2 Pet. R. 227.)

But if the Indians, by the general laws of Spain, had not a right to purchase and hold lands either as individuals or as a community, the decree passing the title to the Indians of the Mission of San Jose was sufficient for that purpose, whether viewed as a legislative or judicial act. It was within the power of the Audiencia to confer this capacity on the Indians, Such would be the Common Law as well as the Civil Law rule of construction. A legislative grant to an alien and his heirs has been held to authorize him to take and transmit. (Jackson v. Goodell, 20 Johns. R. 707.] So with regard to a grant to an Indian. (Id. 193.) Reboul vs. Nero, 2d Martin La. R. 565, Maes vs. Gillard, 9 Martin, La. R. O. S., 544. So with regard to a grant to a town. Town of Refugio vs. Byrne, 25th Texas (1) 193. So with regard to a grant to the Justices of a county, Justices of Butler county vs. Thomason, 11 B. Monroe, 253. So a patent, issued from the land office in pursuance of a statute, is equivalent to a legislative grant, and would convey the right to take, if the grantee had none before. (Jackson v. Lervey, 5 Cow. R. 397.) The decree of the Audiencia of Mexico is, therefore, of equal dignity with a legislative grant, and carries to the Indians the full capacity to take in the precise form of the grant.

Not only are there express laws of the Spanish monarchy, which authorized the Indians to purchase and alineate real estate; but the judical decision of this country have fully recognized their power. Mitchell v. United

States, (9 Pet. R. 752,) is an authority which asserts the right of the Indian to hold and sell. In Martin v, Johnson, (5 Mart. R. 635,) the Court say: "But it is said that "such locations of the Indians on any tract of land did "not convey to them the property of soil, but gave them "a mere possession for the purposes of the Indian mode "of life. By the laws of the Indians, 6, 1, 27, however, "it is recognized that Indians can hold land as well as "other people; nay, that they can alienate it, with per- "mission of Government." (Id. 470; 2 White, 34; Id. 51. 54) In the same case it was held that no one but the Indians is able to take advantage of a nullity in the sale. Spencer v. Grimball, 6 Mart. N. S. 355, is to the same effect.

The Indian communities were always clothed with the same faculties as corporations, wherever Indians resided together as a community. They were entitled to hold property as a community, and to alienate it. From the Louisiana decisions already quoted, it seems, that whenever a community of Indians settled they were, under the laws of Spain, entitled to land; and might sell and choose another location; and were again invested with a league square, without formal grant, These laws are sufficient proof that these communities had capacity to take by grant, After such a length of time a charter of incorporation would be presumed if necessary. (Stockbridge vs. Stockbridge, 12 Mass. R. 400; 2 Kent, Comm. 277; 12 Wheat, R. 64.) Again the grant itself would constitute the grantees a body corporate as to the grant. (2 Kent, Comm. 276; 7 Mass. R. 445; Denton v. Jackson, 2 Johns. Ch. R.; 1 Cow, 671.)

The grant in this case is not to the Catholic church, nor to the Mission, nor to the population of the Mission, generally; but to the "native Indians" of the Mission of San

Jose. It is difficult to see how such language can be tortured into meaning, to the Mission, in its corporate capacity. The language evidently means, not the Mission, as a foundation, nor the whole mass of the population of the Mission; but the resident native Indians of the Mission. It is a grant to a particular class of individuals, by name; and their express enumeration is, by every rule of construction, the exclusion of all other beneficiaries. It is not easy to understand how a grant of land to parties residing in a particular house, could be held to enure to the benefit of the owner of the house, instead of the residents named. The words of the grant, to the Indians, make it a conveyance in fee, with a defeazance; but granting that it might be construed either to that effect, or as a tenancy at will, the grantees would be supported in claiming the fee, on the obvious principle, that the grant must be taken most favorably to them, and that they have a right to elect, if it is capable of two constructions. Such a grant is as certain as a grant to, or an entry by, the heirs of J. F.; which has been held good, (Hunt v. Wickliff, 2 Pet. R. 207,) or a grant to the wife of A. That is certain which may, by proof, be reduced to certainty.—(Shaw v. Loud, 12 Mass. R. 448.) It was not difficult to show by proof, who were native Indians of the Mission. (Shep. Touch. Ch. 12, p. 246; 1 Paine, C. C. R. 652.) See also, Bac. Abr. p. 578, Tit. GRANT, (C.) to the point, that where there are sufficient marks of distinction, the grant would be good without any name at all.

But granting the position, that this was a purchase of land by the Indians, with their own funds, the title to which was made to the Mission for their benefit, this would only constitute the Mission a trustee for the benefit of the Indians, and would not make the grant church property. (2 Kent, Comm. 279; Phillips Academy v. King, 12 Mass. R. 546; Vidal v. Girard's Ex'rs, 2 How.

U. S. R. 186; Hempstead v. Hempstead. 2 Wend. 133.) And as it is a principle of law, that a Court of Chancery will never let an estate fail for want of a trustee. the suppression of the Mission could not affect the estate of the Indians Were a trustee necessary to the preservation of the estate, a Court of equity would appoint one in place of the one extinguished. Neither was the trust foreign to the purposes of the creation of the Mission, which was for the conversion, civilization and support of the Indians. But the principles of the case last cited fully sustain the right of the Mission to take in trust for the Indians. And even if it were held that the title vested in the Mission for the benefit of the Indians, the suppression of that institution and the escheat of its lands and property to the government, could in no wise affect trust property, which it held for other beneficiaries. A law declaring that Mission property should revert to the government could not affect it, either in terms or by construction. And a law of confiscation or suppression would not be extended beyond its terms, so as to embrace the private property of the Indians; especially in the face of laws declaring that all grants shall be made in such a manner as not to interfere with the rights and property of the Indians, either in communities, or as individuals. Neither the decrees of the Cortes of Mexico, nor that of Coahuila and Texas authorize a presumption that either government ever intended to allienate any other property than that which belonged to the Mission, as an establishment. It never was intended to touch the private property of the Indians.

III. By the general colinization law of Mexico of 1824, the right of the States of the Mexican Federation, to the lands within their limits, was acknowledged; and they were directed to prescribe rules and laws for the disposition of them, by colinization. The legislature of Coahuila

and Texas, by decree 177, declared that "the executive is "hereby authorized to alienate the lands that pertained "to the extinguished Missions, conforming in so doing, "to the colinization law of the 24th of March, 1825," cannot be tortured into authority to alienate the lands which belonged, not to the church, but to the Indians residing in the Mission.

Why Spain and the government of Mexico claimed a right to alienate those lands which were strictly Mission property, is seen in the declaration of the Friar; who declares, that the Mission was organized under general laws, and had no particular property, but only general right of usufruct in what was necessary for the accommodation of the Mission. Those decrees therefore invaded no rights of property. But the title in the San Lucas lands, and all the proceedings connected with it, show that it was the intention of the parties to vest the interest in the Indians separate and distinct from the Mission.—It was not land, therefore, that pertained to the Mission. All the proof in the record shows that this decree for the alienation of the Mission property, was confined to that which was strictly Mission property in 1831.

There is one argument which should be conclusive, with the Courts of this country, of the correctness of the construction for which I contend. It was the construction of the Spanish and Mexican governments Every thing in the grant and in the conduct of the Mission proves that it was the the construction of the Spanish authorities. That it was the construction of the Mexican, is proved from the fact, that while the Mission lands, property so called, were alienated under the decree of Coahuila and Texas, of 1831, the San Lucas lands were never alienated, but always respected as the private property of the Indians. As the lands were valuable both for grazing and

agriculture, it seems incredible that they would not have been sold, had they become public domain; especially as the decree expressly directs the sale of all lands which pertained to the extinguished Mission. If these lands were respected as private property, by the authorities of the government, who fully understood the whole subject, it is not to be presumed that the Courts of this country will undertake to say that they were mistaken. The rule is well settled, that they cannot be held to be resumed, as Mission property, without express words to that effect in the decree suppressing the Missions. (Rutherford v. Green, 2 Wheat. R. 203; 6 Pet. R. 733.) If the government of Mexico had actually alienated these lands, under any of the decrees for the sale of Mission property, the Courts of this government might have felt some reluctance to pronounce the sales void, as contrary to the fundamental laws of that government. But the Mexican authorities having respected the grant, as private property, the presumption that it was so, is too violent to be denied in our Courts, after such a length of time.

IV. We further insist that the decendants of the original grantees were not Indians, in the meaning of that term: that as heirs and successors, they took the estate, as other Spanish subjects. It is in proof that they were converted and civilized at the time and long previous to the suppression of the Mission. It appears undeniable, that under the laws of Spain, christian Indians, or those who had received the rites of baptism, could hold and dispose of land as fully as other Spanish subjects; and that no confirmation of their sale was necessary to its validity. This was fully established in the investigation of Louisiana grants, by the United Sattes Commissioners. (2 White, 249.) It was also established that this approbation in the case of other Indians was not a condition precedent to the sale, under the

laws of Spain; but might be had any time after the sale by the Indians. We, therefore, insist that inasmuch as the Indians of the Mission are proved to have been baptised and converted, and in the enjoyment of all the benefits of civilization at the time of the sale, the law, for that reason, discharged the title of the condition. And inasmuch as the confirmation of the sale was not a condition precedent, the purchaser would take the estate, subject to the defesance. The title stipulates, in the condition, that if the Indians dispose of any portion of the land, without approbation, it shall be on pain of nullity, without prejudice to the King or a third party. That is, the King should not be compelled to restore the purchase money, nor the purchaser lose any portion of the land which he had purchased. Unless the language has this meaning it can have none; but would be entirely inoperative, a consequence never to be indulged in construction, when it can be avoided. It must be held to mean, that the title could not be avoided in the hands of a purchaser from the Indians. It appears too, from the authority last cited, that when confirmation was, in truth, a condition, as in the case of unbaptised Indians, it never was withheld, but always given. It conferred a title to which no body could object, but the Indians and the government.

The constitution and laws of Mexico conferred full right of citizenship, upon the whole mass of her Indian population.—From that moment the disability ceased. Conditions which limit or defeat an estate, are always construed strictly against the grantor and liberally to uphold the estate. (Co. Litt. 219, C.) The condition of the estate is, that it shall not be sold without the approbation of the officers of "this kingdom;" and the Spanish government having, by acknowledging the Independence of Mexico rendered compliance impossible, the condition is discharg-

ed.) Arcdondo's case, 6 Pet. R.) The limitation is express, to the authorities of the kingdom of Spain, and cannot be extended by implication. (Hillard R. 249; 1 Paine, C. C. R. 652.)

V. Spain and Mexico discharged the condition, by abolishing entails and all restraints on alienation. (2 White 181; Decs. of C and T., No. 263, p. 240; of Mexico 7 August, 1823, 2 Vol. Dec. 154.) By the Common Law, a restraint upon alienation, such as that contained in this title, would have been void; (4 Kent. Comm. 131;) and the government of Texas, by adopting that system, has discharged it, and restored it to the class of free estate. It has been repeatedly decided in the United States, that abolishing the doctrine of entails restored such estates to absolute property and discharged the conditions.

Again, if a license to sell or an approbation of the sale was necessary, by the authorities of the Mexican government, it will be presumed that it was duly proved before the officer before whom the Indians passed the title. Especially should it be presumed, when it has been held long enough to bar a right of entry under our statutes, as well as under the laws of Spain. Grants are presumed, in analogy to statutes which bar a right of entry. (Strother v. Lucas, 12 Pet. R.; 1 Greenl. Ev. 20, note 1; 8 Pick. R. 504; 10 Id. 295; Ricard v. Williams, 1 Wheat. R. 110.) We know that this condition in Spanish grants, was for the protection of the Indian, who from simplicity and and want of education, was supposed not to be able to cope with the civilized man. The grantor not having said that this condition is to survive to the successors of the Indians, it cannot be extended beyond the origiual grantees. The condition is measured by the precise words used in the defeasance. (Adams on Eject. 191.) If the Mission took the property as trustee, the condition being discharged, the beneficiaries might sell. (4 Kent. Comm. 303.) And

whether discharged or not, the vendee would take, subject to the right of entry by the State.

VI. It does not follow, if this grant was made by composition and the grantees were tenants at will, that they or their vendees may be dispossessed by any other parties. If tenants at will, it was at the will of the government and not of strangers or mere intruders. There is no evidence of any will on the part of the Spanish, Mexican or Texas government, to terminate this tenancy at will. All that could be said upon the subject is, that the governments of Mexico and Texas succeeded to the rights of the crown of Spain and might claim the forfeiture. The forfeiture, when asserted, must be by some method known to the laws. It was not in the power of a subject, under either government, to treat the estate as forfeited, until a judicial finding. Much less, where a party is tenant at will, is it in the power of any citizen, to terminate the estate by setting up his own will for the will of the government. A location by a stranger is not the exercise of a government will. This will can only be manifested by some inquiry, instituted by legislative authority. Until such authority is given, the locator is a mere trespasser, against whom the tenant may have his action. (9 Pet. R. 743.) A grant, by breach of condition subsequent is not void; it is only voidable by those alone who made it. (Weakly v. Wilson, 1 Overt. R. 370; 2 U. S. Digt. 472; Vide especially 11 N. H. R. 9.) This is an action for the possession; and a right of possession is sufficient to sustain it. (Adams on Eject. 35.)

VII. Since writing the above, I have examined the decree of the Spanish government, of 1794, secularizing the Mission of San Jose, and also the proceedings of the Political Chief, in 1829, under the law of Coahuila and Texas,

by which it appears, that this land, under both governments, was recognized as the property of the Indians, and subject to division as their property. It also appears that this property was never treated as belonging to the church; but, by the decrees of both governments, as vested in the Indians, by virtue of the purchase. It appears, furthermore, that none of the property belonged to the church, but to the Indians; and was ordered to be respected as such. It also is made manifest by the decree of 1794, that the Indians could take and hold both real and personal estate, as a community; that they were, in fact, if not a corporation, tenants in common. (Vide Book in the Land Office, Missions, p. 97.)

There can be no doubt that grants for pasture carried the fee. It was the principal business of the inhabitants. But the grant in this case is for agriculture. (U. S. v. Richard, 8 Pet. R. 470; U. S. v. Huertas, 8 Pet. R. 475, 488.)

VIII. If the words of the grant be doubtful, we must have recourse to the settled rule of construction, Hancock vs. McKinney, 7th Texas Rep., 384. If the King's grant admit of two constructions, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, the latter is to prevail, for the reason (says the common law) that it will be more for the benefit of the subject and the honor of the King, 1st Kent's Com., 460 n. b ; Charles River Bridge vs. Warner Bridge et al, 11 Pet. R. 589. The distinction between an imperfect and perfect title by the law of Spain has been repeatedly recognized by the Court. What constituted a perfect title was fully determined in the case of Paschal vs. Perez, 7th Tex. Rep., 348. The fact that a final title had conditions annexed, did not, by the laws of Spain, render it an imperfect title. When conditions were not

precedent, but subsequent, and the final title had issued, or the final act of confirmation had been performed by proper authority, the title was perfect, 8th Howard R. 293. Id. 314–15. The presumption as heretofore repeatedly held by this Court is, that the officer issuing the title acted upon the subject within his jurisdiction until the contrary is made to appear. All laws now in force in Texas not inconsistent with this constitution, shall remain in full force until declared viod, repealed, altered, or expire by limitation. Sec. 1st Schedule Constitution Republic of Texas.

All fines, penalties, forfeitures and escheats which have accrued to Coahuila and Texas or Texas, shall accrue to this Republic. Id. sec. 3d.

All fines, penalties, forfeitures and escheats which have accrued to the Republic of Texas, shall accrue to the State of Texas, and the legislature shall, by law, provide a method for determining what lands may have been forfeited or escheated, Article 13, sec. 4, Constitution of Texas. The legislature of Texas has not made any provision, and until such provision is made, it is evident, under the constitution, no such proceeding can be attempted. Hancock vs. McKenney, 7th Tex. Rep., 384. The lands in controversy have not been forfeited to the State of Texas in accordance with the constitution, and the title is complete, and until forfeited, as the constitution provides, is vested in the vendees of the Indians.

T. T. Crittenden,
Geo. W. Gist,
Of Counsel for Appellees.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~504.~~ 103.

THE WASHINGTON UNIVERSITY OF MISSOURI, APPELLANT,

vs.

GEORGE B. FINCH, ASSIGNEE OF JAMES J. DAILY, BANKRUPT, AND EDWARD R. CHAMBERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED DECEMBER 22, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 564.

THE WASHINGTON UNIVERSITY OF MISSOURI, APPELLANT,

vs.

GEORGE B. FINCH, ASSIGNEE OF JAMES J. DAILY, BANKRUPT, AND EDWARD R. CHAMBERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

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1 MISSOURI DISTRICTS, *set.*:

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the October term thereof, A. D. 1871.

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., complainants, *ag'st* THE WASHINGTON UNIVERSITY ET AL. defendants. } In chancery.

Be it remembered that heretofore, to wit, on the ninth day of August, A. D. 1870, there was filed in the clerk's office of the circuit court of the United States for the districts of Missouri, the following bill in equity in the above-entitled cause, to wit:

Bill.

To the honorable the judges of the circuit court of the United States within and for the district of Missouri, sitting in equity:

George B. Finch, of Mecklenburg County, Virginia, and a citizen of the State of Virginia, as he is assignee of the estate and effects of James J. Daily, of the same county and State, and a citizen of the State of Virginia, bankrupt, and Edward R. Chambers, of Mecklenburg County, Virginia, and a citizen of the State of Virginia, bring this their
2 bill of complaint against The Washington University, a corporation duly established by the laws of the State of Missouri, and doing business at the city of St. Louis, in the State of Missouri, and Seth A. Ranlett, of the city of St. Louis, Missouri, and a citizen of the State of Missouri.

And thereupon your orators complain and say, that one William G. Eliot, of the city of St. Louis, Missouri, on or about the twenty-fourth day of March, eighteen hundred and sixty, being seized in fee-simple of certain real estate situated in the county and city of St. Louis, Missouri, bargained and sold the same to James J. Daily and your orator, Edward R. Chambers, both of the county of Mecklenburg, in the State of Virginia, for the consideration of sixteen thousand dollars, and, together with Abby A. Eliot, his wife, conveyed the same to said Daily and your orator, Edward R. Chambers, jointly, in fee-simple, by deed bearing date the day and year above mentioned, which said deed was duly acknowledged and recorded in the recorder's office of the said county of St. Louis, in book 239, page 144, which said real-estate is described as follows, in said deed of conveyance, viz:

First. The undivided half of a tract or parcel of land, being a part of survey No. 2499, under New Madrid certificate 145, to Martin
3 Coontz, about two miles west of said city, commencing at a point 9 chains and 90 links north (with a variation 8° east) of a point in the northern line of Smith's survey, under certificate 159, and 11 chains, 72 links west of the northeast corner of said Smith's survey; thence running north (with same variation) 9 chains and 90 links to a point; thence westwardly at right angles 5 chains and 86 links; thence southwardly and parallel with the east line of lot hereby conveyed, 9 chains and 90 links to a point; thence eastwardly and at right angles with said last-mentioned 5 chains and 86 links to the point of beginning, containing 5.90 acres, it being lot numbered 9 of the sub-division made by commissioners, in partition, among the heirs of John McKnight.

Second. The undivided half of north half of lot 18, as described on the plat attached to the report of sale made by Henry Chouteau, curator of the estate of Joseph Biddle Wilkinson Penrose, situated in that portion of survey No. 3061, lying in a westerly direction from the new reservoir of the water-works, bounded on the east by a street called Fillmore, now Glasgow avenue; on the south by south half of lot No. 18, as designated on said plat; on the west by the southwestern boundary-line of said survey, and on the north by lots No. 19 & 19½, as designated on said plat, being the same lot conveyed to Christopher by said curator, by deed recorded in book "W, No. 5, page 483, of said recorder's office, and containing 142 acres.

Third. The undivided half of north half of block 10, according to the subdivision of the commissioners appointed to subdivide the estate of McKnight and Brady, beginning at a point in the western line of land owned by Glasgow, 4 chains and forty-five links north of the northern line of the New Madrid certificate, located in the name of J. Smith; thence north 4 chains and forty-five links; thence east 5 chains and eighty-six links; thence south 4 chains and 45 links; thence west 5 chains and 86 links to the place of beginning, bounded north by lot No. 9 in the same subdivision; east by Glasgow avenue; south by land owned or formerly owned by Ridgeway; west by Glasgow, containing 2.95 acres—three tracts aforesaid containing 10.27 acres, more or less. All of the above will more fully and at large appear from the said deed, which your orators will here produce in court, and, for greater certainty, craves leave to refer thereto.

And your orators further say that, though the payment in full of the said sum of sixteen thousand dollars, the consideration of the
5 said sale and conveyance is recited in said deed, the terms of the said sale were the sum of four thousand dollars in cash, and the residue of the purchase-money by the following instalments, viz: The sum of four thousand dollars in one year from the day of said sale; that is to say, on the 24th day of March, 1861, and four thousand dollars in two years from said day, that is to say, on the 24th day of March, 1862; and four thousand dollars in three years from said date; that is to say, on the 24th day of March, 1863; and the whole of the said several sums of money to bear interest at the rate of six per cent. per annum up to the twenty-fourth day of March, 1861, at which time it was contemplated that the first instalment above mentioned of four thousand dollars would be paid, and that the remaining instalments should continue to bear interest up to the said 24th day of March, 1862, at which time it was then contemplated the second installment of four thousand would be paid; and that the last instalment which would still remain unpaid, should continue to bear interest up to the said 24th day of March, 1863, at which time it was then contemplated that the same would be paid, and that the said interest should be paid by half-
6 yearly payments. And your orators say that the said Daily and your orator, Edward R. Chambers, in fact only paid them the sum of four thousand dollars in money, and to secure the payments of the said residue of the purchase-money, as it was then agreed that the same should be paid, executed and delivered to the said Eliot, jointly there three certain negotiable promis'ory notes, signed by themselves and made payable to their order and endorsed by them for four thousand dollars each, and made payable respectively in one, two, and three years from date, and each bearing date the said 24th day of March, 1860; that the said notes were not made to carry interest, but for the convenience of the said Eliot and themselves, they in like

manner executed and delivered to the said Eliot, for the payment of interest as it was then agreed that the same should be paid then, six other negotiable promis'ory notes as follows, viz: Two for three hundred and sixty dollars each, made payable in six and twelve months from date respectively, and two for two hundred and forty dollars, each made payable respectively in 18 months and twenty-four months from date, and two for one hundred and twenty dollars each, made payable respectively in 30 and 36 months from date, and all bearing date the said
7 24th day of March, 1860.

And your orators say expressly that the three notes, for four thousand dollars each, were for the payment of the said residue of the purchase-money, and that the six other notes above-mentioned were for the payment of interest as above set forth.

And your orators further say that the said Daily and your orator, Edward R. Chambers, in order the more fully and effectually to secure to the said Eliot the payment of the said notes, when the same should become lawfully due and payable, did, on the said twenty-fourth day of March, eighteen hundred and sixty, jointly, by deed, convey to one Seth A. Ranlett of the city of St. Louis, in the State of Missouri, in trust, all the above-mentioned real estate, which was conveyed to them by the said Eliot and wife, which said deed in trust was conditioned, that if, when said notes should become due and payable, the same should be fully paid and satisfied, then the said deed in trust should be void and the property therein conveyed should be released at the costs of the said Daily and your orator, Edward R. Chambers; but if, when said notes should become due and payable, the same should not be fully paid and satisfied, the said deed should remain in full force, and the said Ranlett,
8 trustee, might proceed to sell the said property to the highest bidder, at the east front door of the court-house in the county of St. Louis, after having given thirty days' public notice of the time, terms, and place of sale, and of the property to be sold, by advertisement in some newspaper published in the city of St. Louis; and upon such sale, should execute and deliver to the purchaser thereof a deed in fee-simple of the property sold, and receive the proceeds thereof, out of which he should pay, first, the costs of executing said trust, and next what might be due and owing on any of said notes; and the remainder, if any, he should pay to the said Daily and your orator, Edward R. Chambers, or their legal representatives. And the said deed contained the further condition and provision, that the said Ranlett, trustee, should faithfully perform and fulfill the trust therein created; which said deed was duly acknowledged and recorded in the said recorder's office in book 237, page 467, and a certified copy of the same is herewith filed, marked Exhibit (A), and prayed to be taken as a part of this bill, and to which for greater certainty, your orators crave leave to refer, they not being able to produce the original, because the same is in the custody of the said Ranlett and not within their power. And though the said Ran-
9 lett did not sign the said deed, he accepted the said trust and undertook the execution of the same, and contracted, promised and agreed faithfully to perform and fulfil the same. Now your orators expressly say that the notes secured by said deed of trust are the identical notes which were executed and delivered to the said Eliot, as above set forth, and the property conveyed in said trust-deed to said Ranlett is the same property which was conveyed by said Eliot and wife to the said Daily and your orator, Edward R. Chambers, as hereinbefore mentioned.

And your orators further say that the said Daily and your orator, Edward R. Chambers, well and truly paid and satisfied three of the said

notes secured by said deed of trust, that is to say, the note for four thousand dollars, which was made payable in one year from date, and the two notes for three hundred and sixty dollars each, executed and delivered as hereinbefore mentioned, at or about the dates at which the same became due and payable; but that before the happening of any or either of the dates or the days mentioned in any of the other notes executed and delivered as above set forth as the days and the dates at
10 which the same should be paid, and which were the remaining notes mentioned in, and secured by, said deed of trust, a public war, or a war which involved all the consequences of a public war, had commenced and was carried on between an organization of States styling themselves the Confederate States, of which the State of Virginia was one, and the United States, of which the State of Missouri was one, and which continued until some time in the year eighteen hundred and sixty-five, that is to say, until the thirteenth day of June, 1865; and during the whole period of the said war, the said James J. Daily and your orator, Edward R. Chambers, were citizens of the State of Virginia and were residing in the said county of Mecklenburg in said State, and had been citizens of the State of Virginia, and had been residents of the said county ever since a time long prior to the 24th day of March, 1860; and the said Eliot and the said Ranlett, trustee, were citizens of the State of Missouri, and were residing in the city of St. Louis, and had been ever since a time long prior to the last-mentioned date. By reason of which your orators say here before your honors that neither of said last-mentioned notes became due and lawfully payable at either or any of the days or the dates mentioned in any or either of the said notes as the days and the dates in which the same should be paid. Nor did the same or any of them, or either of them, become due and lawfully payable at any time during the period of the said war; and your orators
11 further insist that during the whole of the period of the said war it was impossible and not lawful for the said Daily and your orator, Edward R. Chambers, nor for either of them, to pay to the said Eliot or to the said Ranlett, trustee, any money on account of any or either of said notes, or to hold the intercourse, or to have the communication with the said Eliot or Ranlett necessary to enable them, or either, to pay any money to either the said Eliot or the said Ranlett on account of either of the said notes or on any other account; and that it was further impossible and not lawful for either the said Eliot or the said Ranlett to receive any money from them or either of them on that account, or any other account, or to hold any such intercourse, or have any such communication with them or either of them. And your orators further insist that during the whole of the period of said war, said notes or debts were suspended, and all right of the said Eliot to enforce the same or either of them, and all remedies for the recovery of the same, were suspended. Your orators further say that the Washington University, a corporation duly established by the laws of the State of Missouri, and doing business at the city of St. Louis, became the holders of said last-mentioned notes, but at what particular time said corporation
12 became the holders thereof, or whether for value, your orators do not and have not the means of knowing without a discovery from said corporation; but your orators do say that said corporation did become the holders thereof, at some time during said period of hostilities. That the said Eliot is the president of said corporation, and has been ever since a time long prior to the said twenty-fourth day of March, eighteen hundred and sixty; that at the time said corporation became the holder of said notes, the said Ranlett was a director in the same, a

member of the same, and had been long prior thereto, and was one of the original corporators thereof; that he was also secretary thereof, and has continued ever since that time to be a member and a director and the secretary thereof. And your orators say further that the said corporation, the president, managers, and directors thereof, at the time said corporation became the holder of said notes, had notice, or had been informed, or had reason to believe, or had received some intimation, that the said Daily and your orator, Edward R. Chambers, were citizens of the State of Virginia, residing in the said county of Mecklenburg, and that the two said notes for four thousand dollars each, were exe-
13 cuted and delivered to the said Eliot for the purchase-money of said real estate, and that the two for two hundred and forty dollars each, and the two for one hundred and twenty dollars each, were for the payment of interest as hereinbefore mentioned.

And your orators further say that the said Seth A. Ranlett, trustee, well knowing all the premises, and unmindful of his duties as trustee, and not regarding his undertakings and promises and agreements faithfully to perform and fulfill the said trust, and disregarding totally the rights and interests of the said Daily and your orator, Edward R. Chambers, but for the purpose of depriving them of their rights in and to the property mentioned in said trust-deed, and for the purpose of enabling the said Washington University to obtain the same, which was of great value, for a nominal sum, and claiming and pretending that four of the said notes, executed and delivered as above set forth and secured by said deed of trust, of which said corporation had become the holder, as before mentioned, that is to say, the note for four thousand dollars, which was made payable in two years from date, and the two for 340 dollars each, and one of said notes for 120 dollars each, had become due and payable, and that default had been made in
14 the payment thereof by the said Daily, and your orator, Edward R. Chambers, at the request of the said Washington University that he would sell the property so conveyed to him in trust, caused an advertisement to be inserted for thirty days in the "St. Louis County Legal Record and Advertiser" and the "St. Louis Daily Union," two newspapers then printed and published in said city of St. Louis, that he would, on the ninth day of December, eighteen hundred and sixty-two, sell to the highest bidder, for cash, at public auction, at the east front door of the court-house in said county of St. Louis, the real estate conveyed to him in trust, as hereinbefore mentioned; which said pretended notice, your orators say, was only for the appearance of compliance with the terms of said trust-deed in that particular, he, the said Ranlett, well knowing then that the said Daily and your orator, Edward R. Chambers, were citizens of Virginia and residing in the said county of Mecklenburg, and that said pretended notice could never reach them, and that even if it could, that it was impossible and not lawful for them to come to the city of St. Louis, or to do anything else to protect their interests and their rights; that he did, on the said 9th day of December, in pursuance of said pretended notice, at the east front door of said
15 court-house, assume and effect to expose to sale, at public vendue, for cash, the said real estate, in separate parcels, first offering the piece or tract first described in the deed, from Eliot and wife, hereinbefore mentioned, and in said trust-deed *and in said trust-deed*, which was struck off to the said Washington University for the small sum of five hundred and ninety dollars, and next offering the tract or parcel secondly described in the two said deeds, which was struck off to the said Washington University for the trifling sum of one hundred dollars, and next

offering the tract or parcel last described in the two said deeds, which was also struck off to said Washington University for the trifling sum of one hundred dollars; the whole bringing only the very trifling sum of seven hundred and ninety dollars, which was grossly inadequate as the purchase price of said real estate, and not one-twentieth part of what the same was worth, as will more fully appear hereafter.

And your orators further say that at the time of said pretended sale that the said Washington University, the president, and directors, and managers thereof well knew that said Daily and your orator, Edward R. Chambers, were citizens of Virginia, and then residing in said
16 Mecklenburg County, the same being in fact fully set forth in the said deed from Eliot and wife, and in said deed of trust to said Ranlett, trustee, and that said corporation, the president, and managers, and directors thereof, also well knew that the said real estate was the same which was conveyed by said Eliot and wife to said Daily and your orator, Edward R. Chambers, for the consideration of sixteen thousand dollars, and was conveyed by them to said Ranlett, in trust, for the uses and purposes hereinbefore mentioned, and for none other, and that they had paid the said several sums on account of said notes and said purchase.

Your orators further say that said Ranlett, in pursuance of said pretended sale, undertook and assumed to convey said real estate to the said Washington University, in fee-simple, by deed bearing date the said ninth day of December, which said pretended deed was acknowledged and recorded in the recorder's office of St. Louis County, in book 272, page 38, a certified copy of which is herewith filed, marked Exhibit (B), and prayed to be taken as part of this bill, and to which your orators crave leave to refer, the original being in the custody and possession of the said Washington University, and not in the power of your orators.

Now your orators insist, that said pretended sale and conveyance by said Ranlett, trustee, was without authority, was a gross
17 violation of duty and a breach of trust on the part of said Ranlett, trustee, and that said sale was illegal, null, and void; that the said Washington University knowingly and wilfully participated in said violation of duty and breach of trust committed by said Ranlett. And your orators further say that said Ranlett, at the time of said pretended sale and conveyance, was a member of said Washington University, was a director and secretary thereof, and that said pretended sale was a sale real'y by said Ranlett, trustee, to himself, and that the purchase, by said Washington University, was real'y a purchase by said Ranlett, trustee, at his own sale; for which reason, also, your orators insist that said sale and conveyance were illegal, null, and void, and that said Washington University did not and could not acquire any absolute title to said real estate, by virtue of said illegal and pretended sale and conveyance. But nevertheless, as your orators say, the said Ranlett and the said Washington University claim, for the said Washington University, the full benefit of said pretended sale and conveyance as if the same were legal and valid, and that the said Washington Univer-
18 sity, claiming and pretending to be seized in fee-simple of said real estate, by virtue of said illegal and pretended sale and conveyance, and by virtue thereof claiming to be tenants in common with one Ezekiel B. Kimbal and Julia A., his wife, of the said real estate, the undivided half of which was conveyed, by said Eliot and wife, to said Daily and your orator, Edward R. Chambers, and by them to said Ranlett, in trust for the uses and purposes hereinbefore mentioned; the said Kimbal and wife being seized in fee of an undivided half of said

real estate, as your orators are informed and believe the same to be true, and together with said Kimbal and wife, on the 1st day of August, 1867, sold and conveyed the whole of said real estate, in separate tracts or parcels, and to different persons, as follows, that is to say, one tract or parcel of the same, amounting to four acres and eight hundred and twenty-four thousands, to Timothy Cavanaugh, Daniel Cavanaugh, and Thomas Byrnes, in consideration of the sum of thirteen thousand four hundred and sixty-five dollars, by deed, bearing date the day and year last mentioned, which was duly acknowledged and recorded in the recorder's office of St. Louis County, in book 342, page 369, a certified copy of which is herewith filed, marked Exhibit "C," and prayed to
19 be taken as a part of this bill, and to which your orators crave leave to refer, the original not being in their power. And also two tracts or parcels of said real estate, amounting, together, to four acres and eight hundred and twenty-four one-thousandths, to James Crinion, John Crinion, Jane Crinion, and Elizabeth Moran, wife of John Moran, for the consideration of nineteen thousand dollars, by deed bearing date the same day, which was acknowledged and recorded in said recorder's office, in book 342, page 371, a certified copy of which is herewith filed, marked Exhibit "D," and prayed to be taken as a part of this bill, and to which your orators crave leave to refer, not being able to have the original here in court.

The three said tracts or parcels of land sold and conveyed by two said last-mentioned deeds to the said parties being, as your orators expressly say, the whole of said real estate, the undivided half of which was conveyed by the said Eliot and wife to said Daily and your orator, Edward R. Chambers, and by them to the said Ranlett, in trust, as hereinbefore mentioned, and the whole bringing the sum of thirty-two thousand four hundred and sixty-five dollars, of which said sum the Washington University received the half, amounting to the sum of
20 sixteen thousand two hundred and thirty-two dollars for the undivided half of said real estate, which said corporation claimed by virtue of said pretended and illegal sale and conveyance by said Ranlett, trustee, as hereinbefore mentioned.

Your orators further say that, since said sale and conveyance by said corporation and said Kimbal and wife, the said James J. Daily was adjudged a bankrupt by the district court of the United States within and for the district of Virginia, and that your orator, George B. Finch, was duly and legally appointed assignee of his estate and effects, and that to him was assigned and conveyed all the estate and effects of the said Daily, by deed of assignment bearing date the 20th day of May, 1869, and which is recorded in recorder's office of the said county of St. Louis, in book 400, page 411, in pursuance of certain provisions of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, a certified copy of which said deed of assignment is herewith filed, marked Exhibit "E," and prayed to be taken as a part of this bill, and that your orator, George B. Finch, accepted the said trust, and has undertaken the duty of executing the same.

21 And your orators further say that the said Washington University still hold all of the said notes, of which the same became the holder, as hereinbefore mentioned.

To the end, therefore, that the said Washington University and the said Seth A. Ranlett may, if they can, show why your orators should not have the relief hereby prayed, and may, to the best of their respective knowledge, remembrance, information, and belief, true, full, and

perfect answer make to all and singular the matters and charges aforesaid, and that as fully and particularly as if the same were now repeated, and they severally interrogated thereto, and that the said sale of said real estate by said Ranlett, trustee as aforesaid, to said Washington University may be decreed to be illegal, null, and void; that the same was a breach of trust, committed by said Ranlett; that the said Washington University knowingly and wilfully participated in the said breech of trust committed by said Ranlett; and that the said Washington University did not acquire any valid title to said real-estate by virtue of said illegal sale and conveyance; that the said Washington University may be declared a trustee, with said Ranlett, of said real-estate, for the uses and purposes mentioned in said trust-deed; that the said sale of said real-estate, by said Washington
22 University, to the said parties hereinbefore mentioned, may be declared to have been made by said Washington University as trustee, with the said Ranlett, for the uses and purposes mentioned in said trust-deed, and that the money received by said Washington University from the sale of said real-estate was received by said Washington University in trust, and, as trustee, with the said Ranlett, for the uses and purposes mentioned in said trust-deed; and that the said Washington University and the said Ranlett may be declared accountable to your orators for the sum of sixteen thousand two hundred and thirty-two dollars, for which said real-estate was sold by said Washington University, as hereinbefore mentioned; that they be allowed to retain out of the sum the amount sufficient to satisfy the said notes, secured by said trust-deed which remained unpaid, computing interest on the two said notes for four thousand dollars each only from the time of the termination of said war up to the time of said sale of said real-estate by said Washington University, and not computing any interest on the two said notes for two hundred and forty dollars each, and the two for one hundred and twenty dollars each; and that the remainder of the said sum of sixteen thousand two hundred and thirty-two
23 dollars, with interest from the day of sale of said real-estate, the Washington University and the said Eliot may be decreed to pay over to your orators; that the said Washington University may be required to produce the said notes of which the same became the holders, as herein mentioned, and that the said notes may be decreed to be cancelled; and that your orators may have such other and further relief in the premises as the nature of the circumstances of the case may require, and as shall seem meet to the court, and as shall be agreeable to equity and good conscience:

May it please your honors to grant unto your orators a writ of subpœna, in due form of law, according to the rules of this court, to be directed to the Washington University, a corporation duly established by the laws of the State of Missouri, and doing business at the city of St. Louis, and State of Missouri, and Seth A. Ranlett, of the city of St. Louis, and a citizen of the State of Missouri, commanding them, at a certain day and a certain penalty, to be and appear before this honorable court, and to stand to and abide by and perform such order and decree therein as to this court shall seem meet and shall be agreeable to equity and good conscience.

24 GEORGE B. FINCH,
Assignee of James D. Daily.
EDWARD R. CHAMBERS,
By JOHN E. JONES, *their Attorney.*

JOHN E. JONES, *Counsel.*

Deed of Trust mentioned in complainant's bill, and made exhibit A.

This Deed, made and entered into this twenty-fourth day of March, eighteen hundred and sixty, by and between J. J. Daly and Edward R. Chambers of Mecklenburg county, State of Virginia, parties of the first part, Seth A. Ranlett (trustee) of the county and city of St. Louis, State of Missouri, party of the second part, and William G. Elliott of the said city and county of St. Louis, State of Missour., party of the third part: Witnesseth, that the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to them paid by the said party of the second part, the receipt of which is hereby acknowledged, do, by these presents, grant, bargain and sell, convey and confirm unto the said party of the second part, the following described real estate situated in the county and city of St. Louis:

First—The undivided half of a tract or parcel of land, being part of survey No. 2499, under New Madrid certificate 145, to Martin Coontz, about two miles west of said city, commencing at a point 9 chains and 90 links north (with a variation 8° east) of a point in the north line of Smith's survey, under certificate 159, and 11 chains 72 links west of the north-east corner of said Smith's survey; thence running north (with the same variation) 9 chains and 90 links to a point; thence westwardly at right angles, 5 chains and 86 links; thence southwardly, and parallel with the east line of the lot hereby conveyed, 9 chains and 90 links, to a point; thence eastwardly, and at right angles with said last mentioned, 5 chains and 86 links, to the point of beginning, containing 5.90 acres, it being lot No. 9 of the subdivision made by the Commissioners in partition among the heirs of John McKnight.

Second—The undivided half of north-half of lot No. 18, as described on the plat attached to the report of sale made by Henry Chouteau, Curator of the estate of Joseph Biddle Wilkinson Penrose, situated in that portion of survey No. 3061, lying in a westerly direction from the new Reservoir of the Water-works, bounded on the east by a street called Fillmore street, now Glasgow avenue; on the south by the south-half of lot No. 18, as designated on said plat; on the west by the south-western boundary line of said survey, and on the north, by lots No. 19 and 19 1-2, as designated on said plat, being the same lot conveyed to Christopher Rhodes by said

Curator, by deed recorded in book W5, p. 483, of said Recorder's office, and containing 1.42 acres.

Third—The undivided half of the north-half of block 10, according to the subdivision of the Commissioners appointed to subdivide the estate of McKnight and Brady, beginning at a point in the western line of land, owned by Glasgow, 4 chains and 45 links north of the northern line of the New Madrid Certificate, located in the name of J. Smith; thence north, 4 chains and 45 links; thence east, 5 chains and 86 links; thence south, 4 chains and 45 links; thence west, 5 chains and 86 links, to the place of beginning; bounded north by lot No. 9, in the same subdivision; east, by Glasgow avenue; south, by land, now or formerly owned by Ridgway; and west, by Glasgow, containing 2.95 acres, the three tracts aforesaid, containing 10.27 acres more or less, and being the same land, this day, conveyed to the parties of the first part. To have and to hold the same, with the appurtenances to the said party of the second part, and to his successors forever. In trust, however, for the following purpose:

WHEREAS, the parties of the first part, have executed and delivered to the party of the third part, their several negotiable promissory notes, signed by said first parties, payable to the order of themselves and indorsed by them, all dated 24th of March, 1860, and for the amounts and due at the dates hereinafter mentioned, as follows: One note for $4,000, payable one year after date; one note for $4,000, payable two years after date; one note for $4,000, payable three years after date; two notes for $360 each, one of which is payable six and the other twelve months after date; two notes for $240 each, one of which is payable eighteen and the other twenty-four months after date; and two notes for $120, one of which is payable thirty months after date, and the other thirty-six months after date. Now, if, when said notes are due and payable, the same shall be fully paid and satisfied, then this deed shall be void, and the property hereinbefore conveyed, shall be released at the cost of the said parties of the first part, but if said notes are not well and truly paid when the same are due and payable, this deed shall remain in force, and the said party of the second part, or in case of his death, absence from the State, or refusal to act, the Sheriff of St. Louis county may proceed to sell the property hereinbe-

fore described, or any part thereof, at public vendue, to the highest bidder, at the east front door of the Court-House, in the City of St. Louis, for cash, first giving thirty days' public notice of the time, terms and place of said sale, and of the property to be sold, by advertisement in some newspaper printed and published in the City of St. Louis, and upon such sale shall execute and deliver a deed in fee simple of the property sold, to the purchaser or purchasers thereof, and receive the proceeds of said sale; out of which he shall pay first the costs and expenses of executing this trust, including compensation to the trustee for his services, and next whatever may be due and owing on any of said notes, and the remainder, if any shall be paid to the said parties of the first part, or their legal representatives, and the said party of the second part covenants faithfully to perform and fulfill the trust herein created. In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

Executed in presence of.....

J. J. DALY, [SEAL.]
EDW'D R. CHAMBERS, [SEAL.]

STATE OF VIRGINIA, }
County of Mecklenburg, } ss.

Be it remembered, That, on this 26th day of March eighteen hundred and sixty, before me, the undersigned, a Notary Public, duly qualified for the County and State, afore said, came J. J. Daly and Edw'd R. Chambers, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing, as parties thereto, and they severally acknowledged the same to be their act and deed for the purposes therein mentioned. [SEAL.] In witness whereof, I, John G. Boyd, Notary, as aforesaid, have hereto set my hand and affixed my notarial seal of office, at Clarksville, in Mecklenburg County, Virginia, this 26th day of March, in the year 1860.

JOHN G. BOYD,
Notary Public.

Filed and Recorded, May 9, 1860.

C. KEEMLE,
Recorder.

STATE OF MISSOURI, } ss.
County of St. Louis, }

I, the undersigned, Recorder for said County, certify the foregoing to be a true copy of an instrument in writing executed by J. J. Daly *et al.*, together with the acknowledgment, date of filing and recording thereof, as the same remains of record in Book 237, page 467.

Witness my hand and official seal, this 11th day of November, A. D. 1873.

{SEAL}

W. C. KENNETT,
Recorder of Deeds for St. Louis, Co., Mo.

WASHINGTON UNIVERSITY of St. Louis, *et al.*, Appellants.
vs.
GEORGE B. FINCH, Assignee, *et al.*, Appellees.

No. 312

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICTS OF MISSOURI.

In this cause, it is stipulated and agreed, by the parties and their respective solicitors, that the Deed of Trust, mentioned in the complainant's bill, and made exhibit A (which exhibit is accidentally omitted in the Record), may be supplied by a printed copy of said Deed of Trust, annexed to the transcript of the Record in this cause, and said printed copy shall be taken and considered as a part of the Record in this cause. The said printed copy of said Deed of Trust, is verified by the signatures of the solicitors of the parties respectively.

This stipulation and agreement are made and entered into with a view to avoid the necessity of suggesting diminution of the Record.

JOHN M. KRUM,
Solicitor for Appellants.

W. H. LETCHER,
Solicitor for Appellees.

November 13, 1873.

Exhibit A, referred to in the foregoing bill of complaint, is in the words and figures following, to wit:

25 This indenture, made and entered into this twenty-fourth day of March, eighteen hundred and sixty, by and between William G. Eliot and Abby A. Eliot, his wife, of St. Louis City and County, State of Missouri, party of the first part, and J. J. Daly and Edw'd R. Chambers, of Mecklenburg' County, State of Virginia, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of sixteen thousand dollars to them paid by the said party of the second part, receipt whereof is hereby confessed and acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, convey, and confirm unto the said party of the second part, their heirs and assigns, the following-described real estate, situated in the county and city of St. Louis:

First. The undivided half of a tract or parcel of land, being part of survey No. 2499, under New Madrid certificate 145 to Martin Coontz, about two miles west of said city, commencing at a point 9 chains

26 & 90 links north, with a variation 8° east of a point in the north line of Smith's survey under certificate 159, and 11 chains 72 links west of the northeast corner of said Smith's survey; thence running north (with the same variation) 9 chains and 90 links to a point; thence westwardly, at right angles, 5 chains and 86 links; thence southwardly, & parallel with the east line of the lot hereby conveyed, 9 chains and 90 links to a point; thence eastwardly, and at right angles with said last-mentioned 5 chains and 86 links, to the point of beginning, containing 590 acres, it being lot No. 9 of the subdivision made by commissioners in portion among the heirs of John McKnight.

Second. The undivided half of north half of lot No. 18 as described on the plat attached to the report of sale made by Henry Chouteau, curator of the estate of Joseph Biddle Wilkinson Penrose, situated in that portion of survey No. 3061, lying in a westerly direction from the new reservoir of the water-works, bounded on the east by a street called Fillmore street, now Glasgow avenue; on the south by the south half of lot No. 18, as designated on said plat; on the west by the south-

27 western boundary line of said survey; and on the north by lots No. 19 & 19½, as designated on said plat, being the same lot conveyed to Christopher Rhodes by said curator by deed recorded in book A^5, p. 483, of said recorder's office, and containing 142 acres.

Third. The undivided half of the north half of block 10, according to the subdivision of the commissioners appointed to subdivide the estate of McKnight & Brady, beginning at a point in the western line of land owned by Glasgow, 4 chains & 45 links north of the northern line of the New Madrid certificate, located in the name of J. Smith; thence north 4 chains & 45 links; thence east 5 chains and 86 links; thence south 4 chains and 45 links; thence west 5 chains and 86 links, to the place of beginning; bounded north by lot No. 9, in the same subdivision; east by Glasgow avenue; south by land now or formerly owned by Ridgeway; west by Glasgow; containing 2.95 acres; the three tracts aforesaid containing 10.27 acres, more or less.

To have and to hold the same, with all the rights, privileges, and appurtenances thereto belonging, or in any wise appertaining unto

28 the said party of the second part, heirs, and assigns forever; the said William G. Eliot, of the first part, hereby covenanting that he, his heirs, executors, and administrators will warrant and defend the title to the said premises, and every part thereof, to the said party

of the second part, their heirs and assigns, against the lawful claim or claims of every person or persons whomsoever, claiming or to claim the same or any part thereof.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first herein written.

WILLIAM G. ELIOT. [SEAL.]
ABBY A. ELIOT. [SEAL.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that, on this fourteenth day of April, eighteen hundred and sixty, before me, the undersigned, notary public in and for said county and State, duly commissioned and qualified, came William G. Eliot and Abby A. Eliot, who are personally known to me to be the same persons whose names are subscribed to the foregoing
29 instrument of writing as parties thereto, and acknowledged the same to be their act and deed for the purposes therein mentioned. And the said Abby A. Eliot having been by me first made acquainted with the contents of said instrument of writing, acknowledged, on an examination apart from her husband, that she executed the same and relinquished her dower in the real estate therein mentioned, freely and without compulsion or undue influence of her said husband.

In testimony whereof I have hereunto set my hand and affixed my official seal, at office, in the city of St. Louis, the day and year last aforesaid.

[SEAL.]

ROBERT H. BUCK,
Notary Public, St. Louis County, Missouri.

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder in and for said county and State, do hereby certify that the foregoing deed was, on this fourth day of May, eighteen hundred and sixty, filed for record in my office, and is truly recorded in book No. 239, page 144.

30 Given under my hand and official seal the day and year last aforesaid.

C. KEEMLE, *Recorder.*

Exhibit B, referred to in the foregoing bill of complaint, and made a part thereof, is in the words and figures following, to wit:

[Goverment stamp, $1.00, attached, S. A. K., 12—23, 1864.]

This deed, made and entered into this ninth day of December, eighteen hundred and sixty-two, by and between Seth A. Ranlett, trustee, as hereinafter mentioned, of the city and county of St. Louis, State of Missouri, party of the first part, and "Washington University," a corporation existing under the laws of the State of Missouri, party of the econd part, witnesseth:

Whereas J. J. Daly & Edward R. Chambers, (described as of Mecklenburg County, State of Virginia,) by deed dated the twenty-fourth day of March, eighteen hundred and sixty, recorded in the recorder's office of the county of St. Louis, State of Missouri, in book 237, page 467, did convey to the said party of the first part, to wit, to said Seth A. Ranlett, trustee, the following-described real estate, situated in the

county and city of St. Louis: First. The undivided half of a
31 tract or parcel of land, being part of survey No. 2499, under New Madrid certificate 145 to Martin Coontz, about two miles west of said city, commencing at a point 9 chains & 90 links north (with a variation 8° east) of a point in the north line of Smith's survey under certificate 159, and 11 chains 72 links west of the northeast corner of said Smith's survey; thence running north, with the same variation, 9 chains & 90 links, to a point; thence westwardly, at right angles, 5 chains and 86 links; thence southwardly & parallel with the east line of the lot hereby conveyed, 9 chains and 90 links, to a point; thence eastwardly and at right angles with said last-mentioned 5 chains & 86 links, to the point of beginning, containing 5.90 acres, it being lot No. 9 of the subdivision made by commissioners in partition among the heirs of John McKnight. Second. The undivided half of north half of lot No. 18, as descrieed on the plat attached to the report of sale made by Henry Chouteau, curator of the estate of Joseph Biddle Wilkinson Penrose, situated in that portion of survey No. 3061 lying in a westerly direction from the new reservoir of the water-works,
32 bounded on the east by a street called Fillmore street, now Glasgow avenue; on the south by the south half of lot No. 18, as designated on said plat; on the west by the southwestern boundary line of said survey; and on the north by lots No. 19 & 19½, as designated on said plat; being the same lot conveyed to Christopher Rhodes by said curator, by deed recorded in book W⁵, page 483, of said recorder's office, and containing 1.42 acres. Third. The undivided half of the north of block 10, according to the subdivision of the commissioner appointed to subdivide the estate of McKnight & Brady, beginning at a point in the western line of land owned by Glasgow 4 chains & 45 links north of the northern line of the New Madrid certificate, located in the name of J. Smith; thence north 4 chains & 45 links; thence east 5 chains & 86 links; thence south 4 chains & 45 links; thence west 5 chains & 86 links to the place of beginning; bounded north by lot No. 9 in the same subdivision; east by Glasgow avenue; south by land now or formerly owned by Ridgeway; and west by Glas-
33 gow , containing 2.95 acres. The three tracts aforesaid containing 10.27 acres, more or less, which conveyance was in trust for the following purpose therein named, to wit, to secure the payment of nine certain promissory notes in said deed mentioned, made by said grantors, and all bearing even date with said deed; three of said notes being for the sum of $4,000 each, payable respectively at one year, two years, and three years from date; two for $360 each, payable respectively at six and twelve months from date; two for $240 each, payable respectively at eighteen and twenty-four months from date; and two for $120 each, payable respectively at thirty and thirty-six months from date.

And whereas it was provided in said deed that if said notes were not well and truly paid when the same were due and payable, then said deed should remain in force, and the party of the first part hereto might proceed to sell the property hereinbefore described, (being the same above mentioned,) or any part thereof, at public vendue, to the highest bidder, at the east front door of the court-house, in the city of St. Louis, for cash, first giving thirty days' public notice of the
34 time, terms, and place of said sale, and of the property to be sold, by advertisement in some newspaper printed and published in the city of St. Louis; and upon such sale should execute and deliver a deed in fee-simple of the property sold to the purchaser or purchasers thereof; and whereas certain of said notes in said deed of trust

mentioned and secured, namely, one for $4,000, payable two years after date; and two for $240 each, payable eighteen months and two years after date; and one for $120, payable in thirty months after date, having become due and payable, according to the tenor thereof, did remain, wholly unpaid, in the possession of said Washington University, (holder thereof for value by assignment before maturity,) up to the time of the sale hereinafter mentioned; whereupon said party of the first part undersigned, trustee as aforesaid, being thereunto duly required by said Washington University, the holder of said notes, did on the ninth day of December, eighteen hundred and sixty-two, at the east front door of the court-house, in the city of St. Louis, State of Missouri, proceed to sell the said property at public vendue, to
35 the highest bidder, for cash, first having given thirty days' public notice of the time, terms, and place of said sale, and of the property to be sold, by advertisement published in the "St. Louis County Legal Record and Advertiser," "and the St. Louis Daily Union," two newspapers printed in said city and county of St. Louis, copies of which, with the affidavit of the printers of said papers proving the publication, are hereto annexed and made part of this deed, at which time & place the said tract or parcel of land in said deed of trust first mentioned, (and being the same tract hereinbefore first described,) having been first by said undersigned trustee separately exposed to sale, on the terms above-mentioned, the said party of the second part was the highest bidder for said first-mentioned tract, at the price and sum of five hundred and ninety dollars; and the same was struck off at said price to said "Washington University" accordingly; which price, being insufficient to pay and discharge said notes so due and unpaid, as aforesaid, the said undersigned trustee did
36 then and there also expose to sale, on the same terms, the said second tract, (being the same tract hereinbefore secondly described,) and the said party of the second part was the highest bidder for the said second-mentioned tract, at the price and sum of one hundred dollars; and the same was struck off at said price to said "Washington University" accordingly. The amount received for said first and second tracts, being yet insufficient to pay and discharge said notes so due and unpaid as aforesaid, the said undersigned trustee did then and there further expose to sale, on the same terms, the said third tract, (being the same tract hereinbefore thirdly described,) and the said party of the second part was also the highest bidder for said third-mentioned tract, at the price and sum of one hundred dollars; and the same was struck off, at said price, to said "Washington University" accordingly.

Now, therefore, in consideration of the premises, and of the said several sums so bid, as above-mentioned, being, in all, the entire
37 sum of seven hundred and ninety dollars, to him paid by the said party of the second part, the receipt of which is acknowledged, the said party of the first part hereby grants, sells, and conveys to the said party of the second part all the right, title, and interest, estate, claim, and demand of, in, and to the above-described property, which was vested in him by the above-recited deed. To have and to hold the same, with all the rights, immunities, privileges, and appurtenances thereunto belonging, unto the said party of the second part and it' assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

SETH A. RANLETT. [SEAL.]

[Government stamps attached, $0. 10 cts.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this eighteenth day of December, eighteen hundred and sixty-two, before me, the undersigned, a notary public within and for the county and State aforesaid, duly commissioned and qualified, came Seth A. Ranlett, who is to me personally known
38 to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal at office in the city of St. Louis the day and year last above written.

[SEAL.] EPHRAIM G. OBEAR,
Notary Public, St. Louis County, Missouri.

Trustee's sale.

Whereas by their deed of trust, dated the 24th day of March, 1860, and recorded in the recorder's office of St. Louis County, State of Missouri, in book 237, page 467, J. J. Daly and Edward R. Chambers conveyed to Seth A. Ranlett, trustee, the following described lots or parcels of ground lying and being in the county of St. Louis, State of Missouri: first, the undivided half of a tract or parcel of land being part of survey No. 2499 under New Madrid certificate 145, to Martin Coontz, about two miles west of the city of St. Louis, commencing at a point 9 chains and 90 links north, with a variation of 8° east of a point in the north line of Smith's survey under certificate 159; and 11
39 chains, 72 links west of the northeast corner of said Smith's survey; thence running north (with the same variation) 9 chains and 90 links to a point; thence westwardly, at right angles, 5 chains and 86 links; thence southwardly and parallel with the east line of the lot hereby conveyed, 9 chains and 90 links to a point; thence eastwardly and at right angles with said last mentioned 5 chains & 86 links, to the point of beginning, containing 5.90 acres, it being lot No. 9 of the subdivision made by commissioners in partition among the heirs of John McKnight. Second, the undivided half of north half of lot No. 18 as described on the plat attached to the report of sale made by Henry Chouteau, curator of the estate of Joseph Biddle Wilkinson Penrose, situated in that portion of survey No. 3061 lying in a westerly direction from the new reservoir of the water-works, bounded on the east by a street called Fillmore street, now Glasgow avenue; on the south by the south half of lot No. 18, as designated on said plat; on the west by the southwestern boundary line of said survey;
40 and on the north by lots No. 19 & 19½, as designated on said plat, being the same lot conveyed to Christopher Rhodes by said curator, by deed recorded in book W No. 5, page 483, of said recorder's office, and containing 1.42-100 acres. Third. The undivided half of the north half of block 10, according to the subdivision of the commissioners appointed to subdivide the estate of McKnight & Brady, beginning at a point on the western line of land owned by Glasgow 4 chains and 45 links north of the northern line of the New Madrid certificate located in the name of J. Smith; thence north 4 chains and 45 links; thence east 5 chains and 86 links; thence south 4 chains and 45 links; thence west 5 chains and 86 links, to the place of beginning, bounded north by lot No. 9 in the same subdivision, east by Glasgow avenue, south by land now or formerly owned by Ridgway, and west by Glasgow, containing $2\frac{95}{100}$ acres, the three tracts aforesaid containing $10\frac{27}{100}$ acres, more or less, which said conveyance was made to

41 secure the payment of certain promissory notes therein mentioned.

And whereas certain of said notes have become due and payable, and remain unpaid:

Now, in accordance with the terms of said deed of trust, and at the request of the legal holder of said notes, I will, on Tuesday, the ninth day of December, 1862, between the hours of ten o'clock a. m. and three o'clock p. m. of that day, proceed to sell said property at the east front door of the court-house in the city of St. Louis, State of Missouri, at public vendue, to the highest bidder, for cash, to satisfy said notes, and interest, and costs.

SETH A. RANLETT, *Trustee.*

ST. LOUIS, *November 5th*, 1862.

STATE OF MISSOURI, *County of St. Louis:*

Personally appeared before the undersigned, a notary public within and for the county of St. Louis, Moritz Niedner, who, being duly sworn; deposeth and saith that the annexed advertisement was published in the Louis County Legal Record and Advertiser, (printed within the said county and State, the newspaper of which he is the printer,) for twenty-nine times. The first insertion being on the sixth day of November, 1862, and the last insertion on the ninth day of December, 1862, as follows:

1st	insertion,	vol. 7, No. 51,	dated November	6th, 1862.
42 2d	insertion,	vol. 7, No. 52,	dated November	7, 1862.
3d	do.,	vol. 7, No. 53,	dated "	8, 1862.
4th	do.,	vol. 7, No. 54,	dated "	10, 1862.
5th	do.,	vol. 7, No. 55,	dated "	11, 1862.
6th	do.,	vol. 7, No. 56,	dated "	12, 1862.
7th	do.,	vol. 7, No. 57,	dated "	13, 1862.
8th	do.,	vol. 7, No. 58,	dated "	14, 1862.
9th	do.,	vol. 7, No. 59,	dated "	15, 1862.
10th	do.,	vol. 7, No. 60,	dated "	17, 1862.
11th	do.,	vol. 7, No. 61,	dated "	18, 1862.
12th	do.,	vol. 7, No. 62,	dated "	19, 1862.
13th	do.,	vol. 7, No. 63,	dated "	20, 1862.
14th	do.,	vol. 7, No. 64,	dated "	21, 1862.
15th	do.,	vol. 7, No. 65,	dated "	22, 1862.
16th	do.,	vol. 7, No. 66,	dated "	24, 1862.
17th	do.,	vol. 7, No. 67,	dated "	25, 1862.
18th	do.,	vol. 7, No. 68,	dated "	26, 1862.
19th	do.,	vol. 7, No. 69,	dated "	27, 1862.
20th	do.,	vol. 7, No. 70,	dated "	28, 1862.
21st	do.,	vol. 7, No. 71,	dated "	29, 1862.
22nd	do.,	vol. 7, No. 72,	dated Dec'r	1, 1862.
23rd	do.,	vol. 7, No. 73,	dated "	2, 1862.
24th	do.,	vol. 7, No. 74,	dated "	3, 1862.
25th	do.,	vol. 7, No. 75,	dated "	4, 1862.
26th	do.,	vol. 7, No. 76,	dated "	5, 1862.
27th	do.,	vol. 7, No. 77,	dated "	6, 1862.
28th	do.,	vol. 7, No. 78,	dated "	8, 1862.
29th	do.,	vol. 8, No. 1,	dated "	9, 1862.

43 M. NIEDNER.

Printer's fee, $32.25; affidavit, 25—$32.50.

Sworn to and subscribed before me this ninth day of December, 1862.

[SEAL.] W. HERCKENWRATH, *Notary Public.*

Trustee's sale.

Whereas by their deed of trust, dated the 24th day of March, 1860, and recorded in the recorder's office of Saint Louis County, State of Missouri, in book 237, page 467, J. J. Daly and Edward R. Chambers conveyed to Seth A. Ranlett, trustee, the following-described lots or parcels of ground lying and being in the county of St. Louis, State of Missouri. First. The undivided half of a tract or parcel of land, being part of survey No. 2,499 under New Madrid certificate 145, to Martin Coontz, about two miles west of the city of St. Louis, commencing at a point 9 chains & 90 links north, with a variation of 8° east of a point in the north line of Smith's survey, under certificate 159, and 11 chains 72 links west of the northeast corner of said Smith's survey; thence running north (with the same variation) 9 chains and 90 links to a point; thence westwardly, at right angles, 5 chains and 86 links; thence
44 southwardly and parallel with the east line of the lot hereby conveyed, 9 chains and 90 links to a point; hence eastwardly and at right angles with said last-mentioned 5 chains 86 links, to the point of beginning, containing 5.90 acres, it being lot No. 9 of the subdivision made by commissioners in partition among the heirs of John McKnight. Second. The undivided half of north half of lot No. 18, as divided on the plat attached to the report of sale made by Henry Chouteau, curator of the estate of Joseph Biddle Wilkinson Penrose, situated in that portion of survey, number 3,061, lying in a westerly direction from the new reservoir of the water-works, bounded on the east by a street called Fillmore street, now Glasgow avenue; on the south by the south half of lot number 18, as designated on said plat; on the west by the southwestern boundary-line of said survey, and on the north by lots number 19 & 19½ as designated on said plat, being the same lot conveyed to Christopher Rhodes by said curator, by deed recorded in book W, No. 5, page 483, of said recorder's office, containing
45 $1\frac{42}{100}$ acres. Third. The undivided half of the north half of block 10, according to the subdivision of the commissioners appointed to subdivide the estate of McKnight & Brady, beginning at a point on the western line of land owned by Glasgow, 4 chains and 45 links north of the northern line of the New Madrid certificate, located in the name J. Smith; thence north 4 chains and 86 links; thence east 5 chains and 86 links; thence south 4 chains and 45 links; thence west 5 chains and 86 links to the place of beginning; bounded north by lot No. 9 in the same subdivision, east by Glasgow avenue, south by land now or formerly owned by Ridgway, and west by Glasgow, containing $2\frac{95}{100}$ acres. The three tracts aforesaid, containing $10\frac{27}{100}$ acres more or less, which said conveyance was made to secure the payment of certain promissory notes therein mentioned.

And whereas certain of said notes have become due and payable and remain unpaid:

Now, in accordance with the terms of said deed of trust, and
46 at the request of the legal holder of said notes, I will, on Tuesday, the ninth day of December, 1862, between the hours of ten o'clock a. m. and three o'clock p. m. of that day, proceed to sell said property, at the east front door of the court-house, in the city of St. Louis, State of Missouri, at public vendue, to the highest bidder, for cash, to satisfy said notes and interest and costs.

SETH A. RANLETT, *Trustee.*

ST. LOUIS, *Nov. 5th*, 1862.

STATE OF MISSOURI, *County of St. Louis:*

Personally appeared before the undersigned, clerk of the St. Louis circuit court within and for the county of St. Louis, Edward J. Chassaing, who, being duly sworn, deposeth and saith, that the annexed advertisement was published in the Daily Union, (printed within the said county and State, the newspaper of which he is the printer,) for thirty-two times, the first insertion being on the seventh day of November, 1862, and the last insertion on the ninth day of December, 1862, as follows:

1st	insertion in	vol. 1, No. 148, dated	November 7, 1862.
2nd	do.	vol. 1, No. 149, dated	" 8, 1862.
3rd	do.	vol. 1, No. 150, dated	" 9, 1862.
4th	do.	vol. 1, No. 151, dated	" 10, 1862.
47 5th	do.	vol. 1, No. 152, dated	" 11, 1862.
6th	do.	vol. 1, No. 153, dated	" 12, 1862.
7th	do.	vol. 1, No. 154, dated	" 13, 1862.
8th	do.	vol. 1, No. 155, dated	" 14, 1862.
9th	do.	vol. 1, No. 156, dated	" 15, 1862.
10th	do.	vol. 1, No. 157, dated	" 16, 1862.
11th	do.	vol. 1, No. 158, dated	" 17, 1862.
12th	do.	vol. 1, No. 159, dated	" 18, 1862.
13th	do.	vol. 1, No. 160, dated	" 19, 1862.
14th	do.	vol. 1, No. 161, dated	" 20, 1862.
15th	do.	vol. 1, No. 162, dated	" 21, 1862.
16th	do.	vol. 1, No. 163, dated	" 22, 1862.
17th	do.	vol. 1, No. 164, dated	" 23, 1862.
18th	do.	vol. 1, No. 165, dated	" 24, 1862.
19th	do.	vol. 1, No. 166, dated	" 25, 1862.
20th	do.	vol. 1, No. 167, dated	" 26, 1862.
21st	do.	vol. 1, No. 168, dated	" 27, 1862.
22nd	do.	vol. 1, No. 169, dated	" 29, 1862.
23rd	do.	vol. 1, No. 170, dated	" 30, 1862.
24th	do.	vol. 1, No. 171, dated	December 1, 1862.
25th	do.	vol. 1, No. 172, dated	" 2, 1862.
26th	do.	vol. 1, No. 173, dated	" 3, 1862.
27th	do.	vol. 1, No. 174, dated	" 4, 1862.
28th	do.	vol. 1, No. 175, dated	" 5, 1862.
29th	do.	vol. 1, No. 176, dated	" 6, 1862.
30th	do.	vol. 1, No. 177, dated	" 7, 1862.
31st	do.	vol. 1, No. 178, dated	" 8, 1862.
32nd	do.	vol. 1, No. 179, dated	" 9, 1862.

48 Printer's fee, $28.00; affidavit, 25—$28.25.

Sworn to and subscribed before me this eleventh day of December, 1862.

STEPHEN RICE,
Clk Circuit Court.

Filed and recorded December 23d, 1862.

A. C. BERNOUDY, *Recorder.*

STATE OF MISSOURI, *County of St. Louis:*

I, the undersigned recorder for said county, certify that the foregoing instrument of writing is a true copy of a deed from J. J. Daly et al. by tr. to Washington University, the acknowledgement, the date of

filing and recording, as the same remains of record in my office, in book 272, page 39.

Witness my hand and official seal this 27th May, 1870.

[SEAL.] JULIUS CONRAD, *Recorder.*

[5-c't rev. st'p.]

Exhibit C, referred to in the foregoing bill of complaint and made a part thereof, is in the words and figures following, to wit:

[U. S. stamp, $14.00. W. U., 8, 1, '67.]

This deed, m'de and entered into this first day of August, eighteen hundred and sixty-seven, by and between Ezekiel B. Kemball and Julia A., his wife, and the Washington University, a body-corporate of the city of St. Louis, State of Missouri, parties of the first part, and Timothy Cavanagh, Daniel Cavanagh, and Thomas Byrnes, as tenants in common, of the same place, parties of the second part, witnesseth, that the said parties of the first part, in consideration of thirteen thousand four hundred and sixty-five $\frac{10}{100}$ dollars to them paid by the said parties of the second part, the receipt of which is hereby acknowledged, do, by these presents, grant, bargain, and sell, convey, and confirm unto the said parties of the second part, the following-described tract or parcel of ground, situate in what is known as McKnight's subdivision of part of United States survey No. 2499, in the name of Martin Coontz, and being the northern half-part of block number ten, (10,) and the southern portion of lot or block number nine, (9,) of the subdivision aforesaid, and together containing the quantity of four acres and eight hundred twenty-four thousandths, ($4\frac{824}{1000}$,) bounded north by the balance of said lot No. 9, this day sold and conveyed by said first parties to Jane Crinnion and others; east, by land of McPherson and Moore; south, by land of Ridgway, or the south half of said block No. 10; and west by the centre line of formerly Fillmore, now Garrison avenue, and being the same premises held by said first parties as tenants in common, each an undivided half part: To have and to hold the same, together with all the rights, immunities, privileges, and appurtenances to the same belonging, to the said parties of the second part and to their heirs and assigns forever; the said parties of the first part hereby covenanting that they and their heirs, executors and administrators and legal representatives, shall and will warrant and defend the title to the premises to the said parties of the second part and to their heirs and assigns forever, against the lawful claims of all persons.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

E. B. KIMBALL, [SEAL.]
Per BEN. KIMBALL,
Attorney in Fact.
JULIA A. KIMBALL, [SEAL.]
Per BEN. KIMBALL,
Attorney in Fact.
W. G. ELIOT, [SEAL.]
Pres't Washington University.

Attest: [SEAL.] HENRY HITCHCOCK,
Secretary pro tem. of Washington University, with the seal of said Corportion attached.

51 STATE OF MISSOURI, *County of St. Louis:*

Be it remembered that, on the 11th day of August, eighteen hundred and sixty-seven, before me, the undersigned, a notary public within and for the county of St. Louis aforesaid, came W. G. Eliot, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing, as president of the Washington University, a party thereto, and acknowledged the same to be his act and deed, as president of said Washington University, and the act & deed of the said Washington University, by him, as president, as aforesaid, for the uses and purposes therein mentioned; and then and there came also Benjamin Kimball, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing, as attorney-in-fact of Ezekiel B. Kimball and of Julia A. Kimball, by him, as their attorney-in-fact, as aforesaid, for the purposes therein mentioned, and the said Benjamin Kimball then and there acknowledged that the said Julia A. Kimball, wife of said Ezekiel B. Kimball, by him, said Benjamin Kimball, her attorney-
52 in-fact, as aforesaid, executed the said instrument of writing, and relinquished her right and title in and to all the real estate therein mentioned, as well of dower as otherwise, freely, voluntarily, and without compulsion or undue influence of her said husband.

In testimony whereof I have hereunto set my official signature and affixed my notarial seal, at office, in the city of St. Louis, county and State aforesaid, this the day and year last above written.

[SEAL.] JOSEPH L. PAPIN,
Notary Public in and for St. Louis County, Mo.

(Here follows map, marked page 52.)

COUNTY SURVEYOR'S OFFICE,
St. Louis, June 19, 1867.

This is to certify that, by order of Timothy Cavanah, I have, in June, 1867, surveyed a tract of land, embracing lot No. 9, and the north half of lot 10 of McKnight's subdivision, and also the northern portion of lot 18 of the subdivision of the Penrose tract, and subdivided the same into two equal parts. The above plat is a correct representation of said survey & subdivision.

JULIUS PITZMAN,
County Surveyor.

Survey issued by— JA'S DAVIS, *Deputy.*

[5 c'ts stamp.]

Filed & recorded August 27, 1867.

JULIUS CONRAD,
Recorder.

STATE OF MISSOURI, *County of St. Louis:*

I, the undersigned, recorder for *for* said county, certify the foregoi to be a true and complete copy of an instrument of writing executed b Ezekiel B. Kimball & wife, by their attorney-in-fact, et al., to Timothy Cavanah & Thomas Byrnes, of the certificate of acknowledgment of the plat thereto attached, and of the date of filing and recording thereof, as fully as the same remains of record in my office, in book 342, page 369.

Witness my hand & official seal this 16th day of May, A. D. 1870.

[SEAL.] JULIUS CONRAD,
Recorder

[5-c't st.]

Exhibit D referred to in the foregoing bill of complaint, and made a part thereof, is in the words and figures following, to wit:

[U. S. stamp, $19.00. E. B. K. & others.]

This deed, made and entered into this first day of August, *of August*, eighteen hundred and sixty-seven, by and between Ezekiel B. Kimball and Julia A., his wife, and the Washington University, a body-corporate of the city of St. Louis, State of Missouri, parties of the first part, and Jane Crinnion, John Crinnion, James Crinnion, and Elizabeth
53 Moran, wife of John Moran, of the same place, and as tenants in common, parties of the second part, witnesseth that the said partyes of the first part, in consideration of nineteen thousand dollars to them paid by the said parties of the second part, the receipt of which is hereby acknowledged, do, by these presents, grant, bargain, and sell, convey, and confirm unto the said parties of the second part the following-described tract or parcel of ground, situate in what is known as McKnight's subdivision of a portion of United States survey No. 2499, in the name of Martin Coontz, and partly in the Penrose tract or survey 3061, adjoining, and designated as being the northern part of block number nine (9) of said McKnight's subdivision, containing three acres and three hundred and forty-two one thousandths of an acre, ($3\frac{342}{1000}$;) also, the north half of lot or block number eighteen (18) of said Penrose tract or subdivision thereof, as represented on a plat, accompanying the report of the commissioners in partition among said Penrose, of record in book K 5, page 447, of the records of St. Louis County, con-
54 taining one acre and four hundred eighty-two one thousandths of an acre, ($1\frac{482}{1000}$,) and together contain' four acres and eight hundred and twenty-four one thousandths, ($4\frac{824}{1000}$.) The piece first above described being bounded north by , east by the piece second described and land of said second parties, south by the southern part of said lot or block nine, (9,) this day sold to Cavanagh and others, and west by the centre line of formerly Fillmore, now Garrison avenue; the piece second above described being bounded north by , east by the centre line of Glasgow avenue, south by land of said second parties, and west by the piece first above described, same premises held by said first parties as tenants in common, each an undivided one-half: To have and to hold the same, together with all the rights, immunities, privileges, and appurtenances to the same belonging to the said parties of the second part, and to their heirs and assigns forever; the said parties of the first part hereby covenanting that they and their heirs, executors, and administrators, and legal representatives shall and will warrant and defend the title to the premises to the said parties of the second
55 part and to their heirs and assigns forever against the lawful claims of all persons.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

E. B. KIMBALL.
Per BENJ. KIMBALL, [SEAL.]
Att'y-in-Fact.
JULIA A. KIMBALL,
Per BENJ. KIMBALL, [SEAL.]
Att'y-in-Fact.
W. G. ELIOT, [SEAL.]
Pres't Washington University.
Attest: HENRY HITCHCOCK, [SEAL.]
Secretary pro tem. of Washington University, with the seal of said corporation attached.

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that, on the eleventh day of August, eighteen hundred and sixty-seven before me, the undersigned, a notary public within and for the county of St. Louis aforesaid, came W. G. Eliot, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as president of the Washington University, a party thereto, and acknowledged the same to be his act and deed as president of said Washington University, and the act and deed of the said Washington University by him as president as
56 aforesaid, for the uses and purposes therein mentioned; and then and there came, also, Benjamin Kimball, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as attorney-in-fact of Ezekiel B. Kimball and of Julia A. Kimball, parties thereto, and acknowledged the same to be his act and deed as attorney-in-fact as aforesaid, and the act and deed of the said Ezekiel B. Kimball and Julia A. Kimball, by him, as their attorney-in-fact as aforesaid, for the purposes therein mentioned; and the said Benjamin Kimball then and there acknowledged that the said Julia A. Kimball, by him, as her attorney-in-fact as aforesaid, executed the said instrument of writing, and relinquished her right and title in and to all the real estate therein mentioned, as well of dower as otherwise, freely, voluntarily, and without compulsion or undue influence of her said husband.

In testimony whereof I have hereunto set my official signature and affixed my notarial seal, at office in the city of St. Louis, county
57 and State aforesaid, this the day and year last above written.

[SEAL.] JOSEPH L. PAPIN,
Notary Public in and for St. Louis County, Mo.

Filed and recorded August 27th, 1867.

JULIUS CONRAD,
Recorder.

STATE OF MISSOURI,
County of St. Louis:

I, the undersigned, recorder for said county, certify the foregoing to be a true and complete copy of an instrument of writing executed by Ezekiel B. Kimball & wife, by their attorney-in-fact, et al., to Jane Crinnion et al., of the certificate of acknowledgment, and of the date of filing and recording thereof, as fully as the same remains of record in my office in book 342, page 371.

Witness my hand and official seal this 16th day of May, A. D. 1870.

[SEAL.] JULIUS CONRAD,
Recorder.

[5-c't rev. st'p.]

Exhibit E, referred to in the foregoing bill of complaint, and made a part thereof, is in the words and figures following, to wit:

Assignment of bankrupt's effects.

In the district court of the United States for the district of Virginia

IN THE MATTER OF I. I. DALY, BANKRUPT. } In bankruptcy.

58 DISTRICT OF VIRGINIA, *ss:*

Know all men by these presents that G. B. Finch, of Mecklenburg County, Virginia, has been duly appointed assignee of the estate J. J

Daly, of Boydton, in the county of Mecklenburg and State of Virginia, who has been adjudged bankrupt by decree of this court.

Now, therefore, I, W. W. Forbes, register in bankruptcy for said district, by virtue of the authority vested in me by the fourteenth section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, do hereby convey and assign to the said George B. Finch, assignee as aforesaid, all the estate, real and personal, of the said J. J. Daly, bankrupt, including all property of whatever kind of which he is possessor or in which he was interested or entitled to have on the 31st day of December, A. D. one thousand eight hundred and sixty-eight, together with all his deeds, books, and papers relating thereto, saving and excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act: To
59 have and to hold all the foregoing premises to the said George B. Finch, and to his heirs forever. In trust, nevertheless, for the use and purposes, and with the power, and subject to the conditions and limitations prescribed and set forth in said act.

In witness whereof I, W. W. Forbes, register in bankruptcy, have hereunto set my hand and caused the seal of said district court to be affixed this 26th day of May, anno Domini one thousand eight hundred and sixty-nine.

[L. S. OF THE COURT.] W. W. FORBES, *Register.*

Filed and recorded March 23d, 1870.

JULIUS CONRAD, *Recorder.*

STATE OF MISSOURI, *County of St. Louis:*

I, the undersigned recorder for said county, certify that the foregoing is a true copy of an instrument in writing purporting to be an assignment in bankruptcy of the effects of J. J. Daly, executed by W. W. Forbes, register in bankruptcy, for the district of Virginia, together with date of filing and recording thereof, as the same remains of record in my office in book 400, page 411.

Witness my hand & official seal, at office in St. Louis, this 15th day of June, 1870.

[SEAL.] JULIUS CONRAD, *Recorder.*

[5 ct. rev. stp.]

60 And on the said 9th day of August, A. D. 1870, it being in vacation of said circuit court, the following proceedings were had in this cause, to wit:

Subpœna ordered.

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., complainants, *agst.* THE WASHINGTON UNIVERSITY ET AL., DEfendants.	In chancery.

This day come the complainants, by their solicitors, and file their bill in chancery against the defendant in this cause, and, on motion of said solicitors, it is ordered that a subpœna in chancery be issued in this cause, returnable to rules on the first Monday of September, 1870.

And on the said 9th day of August, A. D. 1870, there was issued out of the clerk's office of said circuit court the following subpœna in chancery, to wit:

Subpœna.

MISSOURI DISTRICT, *sct:*

The President of the United States to the Washington University, a corporation duly established by the laws of the State of Missouri, and Seth A. Ranlett, greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States for the districts of Missouri, on the first Monday of September next, at
61 the city of St. Louis, then and there to answer the bill of complaint of George B. Finch, a citizen of the State of Virginia, as assignee of the estate and effects of James J. Daly, bankrupt, and Edward R. Chambers, a citizen of the State of Virginia, filed against you on the ninth day of August, 1870. Hereof fail not.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, the ninth day of August, 1870. Issued at office, in the city of St. Louis, under the seal of said court, the day and year last aforesaid.

[SEAL.] BEN. F. HICKMAN, *Clerk.*

MEM.—The defendant' to enter their appearance in this suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

BEN. F. HICKMAN, *Clerk.*

Upon said subpœna the marshal of the United States for the eastern district of Missouri made the following return, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by leaving a copy of the subpœna in chancery, together with a copy of the bill of complaint for William G. Eliot, president of the Washington University, at his dwelling-house & usual
62 place of abode, with a white person over the age of fifteen years, and a member of his family at St. Louis, within the eastern district of Missouri, Aug. 15, 1870, and by leaving a copy of the subpœna in chancery for Seth A. Ranlett at his dwelling-house or usual place of abode, at St. Louis, within the eastern district of Missouri, Aug. 15, 1870.

C. A. NEWCOMB,
U. S. Marshal E. D. Mo.,
By I. SAUER, *Dep'ty.*

And afterwards, on the 3d day of September, A. D. 1870, it being in vacation of said circuit court, the following proceedings were had in this cause, to wit:

Appearance entered.

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., complainants. *agst.* THE WASHINGTON UNIVERSITY ET AL., DEFENDANTS. } In chancery.

This day come the defendants, by their solicitors, and enter their ap-

pearance to the bill of complain*ants* heretofore filed herein against them.

The appearance entered as aforesaid is in the words and figures following, to wit:

Appearance.

GEORGE B. FINCH, ASSIGNEE, &C., & EDward R. Chambers,
vs.
WASHINGTON UNIVERSITY & SETH A. RANlett.

The defendants in the above-entitled cause hereby enter their appearance therein.

KRUM & DECKER,
Sol's for Def'ts.

63 And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and holden at the city of St. Louis in and for said districts, on the first Monday of October, A. D. 1870, the following proceedings were had in this cause on Monday the 3d day of October, in said last-mentioned year, to wit:

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., complainants,
agst.
THE WASHINGTON UNIVERSITY ET AL., DEfendants.
} In chancery.

This day come the defendants by their solicitors and file their separate answers to the bill of complain*ants* herein against them.

64

65 The answer of the defendant the Washington University, filed as aforesaid, is in the words and figures following, to wit:

GEORGE B. FINCH, ASSIGNEE OF JAMES J. Daly, et al., complainants,
against
THE WASHINGTON UNIVERSITY ET AL., DEfendants.

The Washington University, one of the defendants in this cause, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception, which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant answering separately, admits the making of the notes and deed of trust by James J. Daly and Edward R. Chambers, as stated in said bill, and admits also that Seth A. Ranlett, co-defendant herein, accepted the trust created in and by said deed.

Further answering, this defendant saith it has no knowledge
66 or information, except as informed by complainants' said bill,

that the said Daly and Chambers were citizens and residents of the State of Virginia, as in said bill is alleged. Further answering, this defendant admits that it is a corporation, duly incorporated under the laws of the State of Missouri, and says that it beccame incorporated long prior to the making of the notes and deed of trust mentioned in said bill of complaint. Further answering, this defendant says that, under and by virtue of said laws of Missouri, Washington University became and was established for educational purposes exclusively, having neither capital or shares of stock, and this defendant by the laws aforesaid was and is authorized to take, receive, and hold both real and personal property by purchase, devise, or gift, and this defendant became the endorser and holder of each and all of the notes mentioned in said bill of complaint, within one month after said notes were made, and long before either of them became due, and this defendant was
67 the lawful holder of each and all of said notes at the time of the making of the trustees' sale, mentioned in the said bill of complaint.

Further answering, this defendant denies the allegation in said bill of complaint, that, at the time it became the holder of said notes, it had any notice, knowledge, or information, that said James J. Daly and the complainant, Edward R. Chambers, were citizens of the State of Virginia, or residents therein. Further answering, this defendant denies that Seth A. Ranlett, co-defendant herein, was in any particular unmindful of his duties as trustee under said deed of trust. This defendant denies that said Ranlett, in advertising said property for sale, under the power contained in said deed of trust, and this defendant denies that said Ranlett advertised said property under said deed, for the purpose of enabling this defendant to obtain said property. Further answering, this defendant says that it requested the defendant, Seth A. Ranlett, to advertise said property for sale under the power contained
68 in said deed of trust, three of said notes then having become due and remained unpaid at the time said request was made. And said Ranlett conducted and made sale of the said property at public vendue, strictly in conformity with the power and conditions contained in said deed of trust, and in conducting said sale said Ranlett acted impartially, and in all things discharged his whole duty as trustee. Further answering, this defendant states that said sale was conducted in the most public manner, and in the way that sales of real estate at public vendue under deeds of trust are usually conducted and made in the city and county of St. Louis; and this defendant in good faith became the purchaser of said real estate, being the highest and best bidder therefor; and this defendant denies that in the making of said sale there was any violation of duty on the part of said Seth A. Ranlett.

Further answering, this defendant admits that said Seth A. Ranlett,
69 at the time of making said sale, was one of the directors of Washington University, and also secretary thereof, but this defendant denies that said Ranlett, as trustee, made sale of said real estate to himself, as charged in complainants' said bill. This defendant alleges that the said Ranlett and the other directors of Washington University have no pecuniary interest whatever in the property, real or personal, owned by said institution, and that said sale, in the very nature of things, could not be, and was not, of any pecuniary advantage or gain, directly or indirectly, to said Seth A. Ranlett.

Further answering, this defendant denies that, at the time it became the purchaser of said real estate, it was informed or had knowledge that said Daly and Chambers were citizens of Virginia, and residing therein, as charged in said bill of complaint.

Further answering, this defendant states that the expenses attending said sale amounted to the sum of $73.15, which, deducted from the amount bid by this defendant for said real estate, left the sum of $716.85 to be applied toward the payment or extinguishment of the debt
70 secured by said deed of trust, the balance of said debt remaining unpaid, and which said balance still remains unpaid, and the said balance, with interest, amounted at the time the complainants exhibited their said bill of complaint to the gross sum of $12,852.35, or thereabouts.

Further answering, this defendant denies that, at the time the said notes for $240 each, payable respectively in eighteen and twenty-four months from date, and one for $4,000, payable in twenty-four months from date, became due, a public war, or a war involving all the consequences of a public war, had commenced and was carried on between the United States and the so-called Confederate States, as charged in said bill of complaint, and whether said James J. Daly and the complainant Edward R. Chambers were citizens of the State of Virginia, and residing therein at the time said notes or either of them became due, this defendant has no knowledge or information except as informed by the complainants' said bill of complaint. And as to the allegation
71 in said bill of complaint, that neither of said notes became due and lawfully payable at either or any of the days or dates mentioned in said deed of trust, as the days or dates on which the same should be paid, and the further allegation that the said notes or either of them become due or lawfully payable at any time during the period of the said alleged war, this defendant is advised that said allegations are purely matters of law, but this defendant, answering the said allegations, denies the same and each of them.

Further answering, this defendant denies that said notes or said debt, or the right to enforce the collection of the same, became or were suspended at any time, by reason of the alleged existance of the said war, and as to the allegation in said bill of complaint, that during the whole period of the alleged war, it was impossible and not lawful for said James J. Daly and Edward R. Chambers, or either of them, to pay to said Eliot or to said Ranlett, or to this defendant, any money on account of any or either of said notes, or to hold the intercourse or to have the
72 communication with said Eliot or said Ranlett or this defendant, necessary to enable them to pay said notes or either of them, and as to the further allegation, that it was impossible and not lawful for either the said Eliot, or the said Ranlett, or this defendant to receive any money from said Daly and Chambers, or either of them, on account of said notes, as to all of the said several allegations, this defendant denies each and all of them.

Further answering, this defendant states that some time in the year 1865, or early in 1866, this defendant, and before the sale of said land to the present owners, offered to convey the said real estate acquired at said trustee's sale to said James J. Daly and Edward R. Chambers, if they would pay their said notes, and the interest which had accrued upon them, but said Daly and Chambers refused to accept the said offer of this defendant.

Further answering, this defendant has no knowledge or information, except as informed by said bill of complaint, whether or not said James J. Daly has been adjudged a bankrupt, and that said George B.
73 Finch had been appointed assignee of said Daly's estate as alleged in said bill.

This defendant denies that the complainants are entitled to the relief

prayed for in their said bill of complaint, and having fully answered the same, this defendant prays to be hence discharged with its costs.

W. G. ELIOT, *Pres't.*

KRUM AND DECKER,
Solicitors for defendant.

DISTRICTS OF MISSOURI, *ss:*

William G. Eliot, president of Washington University, being duly sworn, says that the several matters in the foregoing answer, stated on his own knowledge and information are true, and those stated on the knowledge and information derived from others he believes to be true.

W. G. ELIOT.

Sworn and subscribed to this 7th day of October, A. D. 1870, before me.

JOHN M. KRUM,
U. S. Com'r for Dist's of Mo.

The answer of the defendant, Seth A. Ranlett, filed as aforesaid, is in the words and figures following, to wit:

GEORGE B. FINCH, ASSIGNEE OF JAMES
74 J. Daly et al., complainants,
against
THE WASHINGTON UNIVERSITY ET AL., DEFENDANTS.
} In chancery.

Seth A. Ranlett, one of the defendants in this cause, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint, contained for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, separately saith, that he has no interest either in the subject or object of this suit, and this defendant hereby disclaims having any interest in or right to any or either of the matters or things mentioned in the complainant's said bill of complaint.

This defendant was merely a naked trustee under the deed of trust mentioned in the complainant's bill, and this defendant performed his duty and executed the said trust in good faith, and impartially;
75 therefore this defendant denies that he was unmindful of his duties as trustee, *and* in advertising the real estate mentioned in said bill, for sale, or in selling the same. This defendant denies that he disregarded the rights and interests of the said James J. Daly and said Edward R. Chambers, or either of them, and this defendant denies tha he advertized said real estate and made sale thereof for the purpose of enabling the said Washington University to obtain said real estate for a nominal sum, as is alleged in said bill of complaint. This defendant prays that he may be hence discharged, with costs.

S. A. RANLETT.

KRUM & DECKER,
Solicitors for Def't.

DISTRICTS OF MISSOURI, *ss:*

Seth A. Ranlett, being duly sworn, says that the several matters in the foregoing answers, stated on his own knowledge and information,

are true, and those stated on the knowledge and information derived from others he believes to be true.

S. A. RANLETT.

Subscribed and sworn to this 3d day of October, A. D. 1870, before me. In witness whereof I have hereunto set my hand and seal the
76 day and year last above wrltten.

[SEAL.]

M. J. SULLIVAN,
Notary Public, St. Louis Co., Mo.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this cause, on Wednesday, the second day of November in said year, to wit:

Time for taking testimony extended.

GEORGE B. FINCH, ASSIGNEE, &, ET AL., COMplainant,
against
THE WASHINGTON UNIVERSITY ET AL. DEfendants. } In chancery.

This day come the parties herein, by their respective solicitors, and, by consent of parties, it is ordered that the time for taking testimony in this cause be extended until the first day of the next term of this court.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this cause, on Monday, the seventh day of November, in said year, to wit:

Exceptions to answers filed

GEORGE B. FINCH, ASSIGNEE, & ET AL., COMplainant
against
THE WASHINGTON UNIVERSITY, ET AL. DEfendants. } In chancery.

This day come the complainants, by their solicitor, and file
77 their exceptions to each of the answers hereinbefore filed by the defendants, The Washington University and Seth A. Ranlett, for insufficiency of such answers, and also file their exceptions to the answer of said Washington University, for impertinence.

The exceptions to the answer of the defendant *of* the Washington University, for insufficiency, filed as aforesaid, is in the words and figures following, to wit:

Exceptions to the answer of the defendant, The Washington Univ'ty, for insufficiency.

In the circuit court of the United States for the districts of Missouri.

GEORGE B. FINCH, ASSIGNEE OF JAMES J. DALY et al., complainants,
vs.
THE WASHINGTON UNIVERSITY ET AL., DEfendants. } In chancery.

Exception taken by the complainants to the imperfect and insufficient answer of The Washington University, one of the said defendants.

1st. For that the said defendant has not, in & by its said answer, to the best of its knowledge, remembrance, information, and belief, answered and set forth whether the said Daly and the complainant, Edward R. Chambers, paid three of the said notes secured by the deed of trust, that is to say, the note for 4,000 dollars, and the two notes
78 for three hundred and sixty dollars each, as is alleged in said bill.

2nd. For that the said defendant has not, in and by his said answer, in manner and form aforesaid, answered and set forth whether, at the time it became the holder of said note, yet the said Washington University, its president, managers, and directors, had notice or had been informed, or had reason to believe, or had received some intimation whether said Daly and the complainant, Edward R. Chambers, were citizens of the State of Virginia, and residing in the county of Mecklenburg, in said State, as in the complainant's bill is alleged.

3rd. For that the said defendant has not, in and by its said answer aforesaid, answered and set forth whether the said William G. Eliot is the president of said corporation, and has been ever since a time long prior to the said 24th day of March, 1860, as is alleged in said bill.

4th. That said defendant has not, in and by its said answer in manner aforesaid, answered and set forth whether, at the time it became
79 the holder of said note, the defendant, Seth A. Ranlett, was one of its members, was one of its directors, was secretary thereof, as is alleged in said bill.

5th. For that the said defendant has not, in and by its said answer, in manner aforesaid, answered and set forth whether said Ranlett, co-defendant, caused a notice to be published in two newspapers published in the city of St. Louis, that he would, at the east front door of the court-house in St. Louis County, sell at public auction, on the ninth day of December, 1862, the real estate conveyed to him in trust, as is alleged in said bill.

6th. For the said defendant has not, in and by its answer, in manner aforesa d, answered and set forth whether said Ranlett, co-defendant, in pursuance of said advertisement, assumed and affected to expose to sale at public auction, at the east front door of the court-house in Saint Louis County, on the ninth day of December, 1862, the said real estate, as is alleged in said bill.

7th. For that it is alleged in said complainant's bill that at the
80 time of said pretended sale by said Ranlett, the said Washington University, its president, manager, and directors thereof, well knew that said Daly and the complainant, Edward R. Chambers, were citizens of the State of Virginia, and residing in said Mecklenburg County, the same being fully set forth in the deed from Eliot & wife *the* said Daly & Chambers, and in the deed of trust to said Ranlett, and the said defendant has not, in and by his said answer in manner aforesaid, answered and set forth whether at the said time its president, manager, and directors knew that the said Daly and Chambers were citizens of Virginia, and residents of said county, as is alleged in said bill.

8th. That is alleged in complainant's bill that said Ranlett, in pursuance of said pretended sale, undertook and assumed to convey said real estate to the said Washington University in fee simple, by deed bearing date the said 9th day of December, 1862, and the said defendant has not, in and by its said answer, in manner aforesaid, answered and
81 set forth whether said Ranlett did on said day undertake and assume to convey the said real to the said Washington University, as alleged in said bill.

9th. That it is alleged in complainant's bill that the said Wash-

ington University, claiming to be seized in fee simple of said real estate, by virtue of said illegal and pretended sale, and claiming, by virtue thereof, to be tenant in common with one Ezekial B. Kimball and Julia, his wife, of said real estate, the undivided half of which was conveyed by said Daly and Chambers *the* said Ranlett in trust, together with said Kimball and wife, on the 1st day of August, 1867, sold and conveyed the same in different tracts and to different parties as follows: One tract or parcel to Timothy Cavanaugh, Daniel Cavanaugh, and Thomas Byrnes, and two tracts to James Crinion, John Crinion, Jane Crinion, and Elizabeth Moran; and the said defendant has not, in and by its said answer, in manner aforesaid, answered and set forth whether it, in manner and form as alleged in said bill, did convey said real estate to said party.

82 10th. That it is alleged in said bill that the three said tracts of land so sold and conveyed to said parties, it being the whole of said real estate, the undivided half of which was conveyed by said Daly and complainant, Edward R. Chambers, to said Ranlett in trust; and that said defendant has not, in and by the said answer in manner aforesaid, answered and set forth whether the three said tracts are the whole of said real estate, as alleged in said bill.

11th. For that said defendant has not, in and by its said answer, in manner aforesaid, answered and set forth whether the whole of said real estate brought the sum of thirty-two thousand four hundred and sixty-five dollars, as is alleged in said bill.

12th. That it is alleged in said bill that of *of* the sum of thirty-two thousand four hundred and sixty-five dollars which the whole of said real estate brought, the said Washington University received the half, amounting to the sum of sixteen thousand two hundred and thirty-two dollars, for the undivided half of said real estate which said cor-

83 poration claimed by virtue of said illegal and pretended sale and conveyance by said Ranlett, trustee," and the said defendant has not, in and by his answer in manner aforesaid, answered and set forth whether said defendant received the said sum of sixteen thousand two hundred and thirty-two dollars for the undivided half said real estate which it claimed by virtue of said illegal sale and conveyance by said Ranlett, as alleged in said bill.

In all of which particulars the said complainants except to the answer of the said defendant as evasive, imperfect, and insufficient, and humbly prays that said defendant may be compelled to put in full, complete, and sufficient answers.

JOHN E. JONES,
Solicitor for Complainant.

The exceptions to the answer of the defendant of the Washington University for impertinence, filed as aforesaid, is in the words and figures following, to wit:

Exceptions to the answer of the defendant, The Washington University, for impertinence.

In the circuit court of the United States within and for the districts of Missouri.

84 GEORGE B. FINCH, ASSIGNEE OF JAMES J. Daly et al., complainant, *vs.* WASHINGTON UNIVERSITY ET AL, DEFENDANTS. } In chancery.

Exceptions taken by the above complainants to the answer of the Washington University, one of the defendants, for impertinence.

1st. The complainants excepts to so much of the said defendants' answer as alleges that "the Washington University became and was established for educational purposes exclusively, having neither capital nor shares of stock;" that the same is impertinent and irrelivant, and prays that the same may be expunged.

2nd. The complainants except to so much of the answer of the said defendants as alleges that the "said sale was conducted in the most public manner and in the way that sales of real estate at public vendue under deeds of trust are usually conducted, and made in the city of Saint Louis;" and that this defendant became the purchaser of said real-estate, being the highest and best bidder therefore; that the same is impertinent, and prays that the same may be expunged.

85 3d. Complainants except to so much of defendants' answer as alleges that "the said Ranlett and the other directors of the Washington University have no pecuniary interest in the property, real and personal, owned by said institution; and that said sale, in the nature of things, could not be, and was not, of any pecuniary advantage or gain, directly or indirectly, to said Seth A. Ranlett;" the same is impertinent and irrelivant; and prays that the same may be expunged.

4th. The complainants except to so much of the answer of the said defendants as alleges that "the expence attending said sale amounted to the sum of 73.15 c'ts; which, deducted from the amount bid by this defendant for said real estate, left the sum of 715.86 c'ts to be applied toward the payment and extinguishment of the debt secured by said deed of trust; the balance of said debt remaining unpaid, and which said balance still remains unpaid, and the said balance, with interest, amounted, at the time the complainants exhibited their said bill of complaint, to the gross sum of $12,852.35 c'ts or thereabout;" that

86 the same is impertinent and irrelivant, and prays that the same may be expunged.

5th. The complainants except to so much of the said defendants' answer as alleges that, "at some time in the year 1865, or early in the year 1866, and before the sale of the said land to its present owner, this defendant offered to convey said real estate acquired at said trustee's sale to said Daly & Chambers if they would pay said notes, and the interest *have* accrued upon them; but said Daly & Chambers refused to accept the said offer of the defendants;" that the same is irrelivant and impertinent, and prays that the same may be expunged.

JOHN E. JONES,
Solicitor for Complainant.

The exceptions to the answer of the defendant, Seth A. Ranlett, for insufficiency filed as aforesaid, is in the words and figures following, to wit:

Exceptions to the answer of the defendant, Seth A. Ranlett, for insufficiency.

In the circuit court of the United States for the districts of Missouri.

GEORGE B. FINCH, ASSIGNEE OF JAMES J. DALY et al., complainants,
vs.
WASHINGTON UNIVERSITY ET AL. } In chancery.

87 Exceptions taken by the above complainants to the disclaimer and answer of the defendant, Seth. A. Ranlett, for insufficiency.

1st. For that said defendant has not, in and by his said answer, according to the best of his knowledge, remembrance, information, and belief, answered whether the said complainant conveyed the property to him in trust for the uses and purposes mentioned in said bill.

2nd. For that said defendant has not, by and in his said answer in manner aforesaid, answered and set forth whether he accepted the trust, and undertook to execute the same, as alleged in the bill.

3d. For that said defendant has not, by and in his said answer in manner aforesaid, answered and set forth whether the Washington University became the holders of said notes secured by said deed of trust, as alleged in said bill.

4th. For that said defendant has not, in and by his said answer in manner aforesaid, answered and set forth whether the said
88 Washington University is a corporation duly established by the laws of the State of Missouri, and doing business at the city of St. Louis, as is alleged in said bill.

5th. For that said defendant has not, in and by his said answer in manner and form aforesaid, answered and set forth whether, at the time said corporation became the holder of said notes, he, the said defendant, was a director in the same, was a member of the same, and had been long prior thereto; was the secretary thereof, and was one of the original corporators thereof, as is alleged in said bill.

6th. For that said defendant has not, in and by his said answer in manner aforesaid, answered and set forth whether, during the whole of the period of the war carried on between the organisation styling themselves the Confederate States of America, and the United States, the said Daly and the complainant, Edward R. Chambers, were citizens of the State of Virginia, and residents of the county of Mecklenburg, in said State, as alleged in said bill.

7th. For that said defendant has not, in and by his said answer
89 in manner aforesaid, answered and set forth whether, during the period of said war, he, the said defendant, and William G. Eliot, were citizens of the State of Missouri, and residents of the city of St. Louis, as alleged in said bill.

8th. For that the said defendant has not, in and by his said answer in manner aforesaid, answered and set forth whether, at the request of the Washington University, he caused an advertisement to be inserted in the St. Louis County Legal Record and Advertiser, and the St. Louis Daily Union, two newspapers then published in the city of St. Louis, that he would sell the property conveyed to him in trust, at public auction, to the highest bidder, for cash, on the second day of December, 1862, at the east front door of the court-house in St. Louis County, as alleged in the said bill.

9th. For that the said defendant has not in and by his said answer, set forth whether, at the time he caused the advertisement to be inserted in said newspapers, he, the said defendant, knew that the said Daly and the complainant, Edward R. Chambers, were citizens of Virginia, and residents of said county of Mecklenburg, as alleged in said bill.

90 10th. For that the said defendant has not, in and by his said answer in manner aforesaid, answered and set forth whether, in pursuance of said advertisement, he did, on the said 9th day of December, and at the place mentioned in the 9th exception, assume and affect to expose to sale at public auction the real estate conveyed to him in trust in separate parcels, as alleged in said bill.

11th. For that said defendant has not, in his said answer in man-

ner aforesaid, answered and set forth whether, at said public auction, the said Washington University was a bidder for the said property, and the same were struck off to the said Washington University, as is alleged in said bill.

12th. For that the said defendant has not, in his said answer in manner aforesaid, answered and set forth whether he, the said defendant, in pursuance of said sale, undertook to convey the said real estate by deed in fee simple to said Washington University.

13th. For that said defendant has not, in and by his said answer in manner aforesaid, answered and set forth whether, at the time
91 of said public auction and conveyance to said Washington he, the said defendant was a member, and director, and secretary of said Washington University, as is alleged in said bill.

14th. For that the said defendant has not, in and by his said answer set forth in manner and form aforesaid, whether said Washington University afterwards, on the day of 1867, sell the said real estate for the sum of sixteen thousand dollars, as alleged in said bill.

In all of which particulars, the said complainants except to the disclaimer and answer of the said defendant, as evasive, imperfect, and insufficient, and humbly prays that said defendant may be compelled to put in full and sufficient answers thereto.

JOHN E. JONES,
Solicitor for Complainants.

And afterwards, at rules begun and holden at the clerk's office of said circuit court, on Monday, the fifth day of December, A. D. 1870, to wit:

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., complainants,
ag'st
92 THE WASHINGTON UNIVERSITY ET AL., defendants. } In chancery.

Motion for hearing of exceptions filed.

This day come the complainants, by their solicitor, and file their motion for a hearing of their exceptions to the answers heretofore filed by defendants herein; which motion is in the words & figures following, to wit:

Motion.

GEORGE B. FINCH, ASSIGNEE, ET AL.,
vs.
THE WASHINGTON UNIVERSITY ET AL.

In the circuit court of the United States for the districts of Missouri.

The complainants in the above cause, having filed their exceptions to the answer of Seth A. Ranlett, and to the answer of the Washington University, defendants in the above cause, at the November rules, 1870, and the said defendants not having amended their answer, the said complainants ask that the same be heard this day, or at such other time as may best suit the hon. judge of this court.

December 5th, 1870.

JOHN E. JONES,
Solicitor for Complainants.

93 And afterwards, at the April term, A. D. 1871, of said circuit court, the following further proceedings were in this cause on Monday, the third day of April in said year, to wit:

Exceptions to answers submitted and taken under advisement.

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., complainants, *ag'st* THE WASHINGTON UNIVERSITY ET AL., defendants. } In chancery.

This day come the parties by their respective solicitors, and thereupon the exceptions heretofore filed by the complainants to the answer of said defendants were submitted to the court, and the court not being fully advised in the premises, takes time to consider thereof.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this cause, on Thursday, the sixth day of April in said year, to wit:

Exceptions for impertinence overruled, and exceptions for insufficiency withdrawn by leave.

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., complainants, *ag'st* THE WASHINGTON UNIVERSITY ET AL., defendants. } In chancery.

This day come the complainants, by their solicitors, Mess. Davis and Thoroughman, and John E. Jones, esquire, and the exceptions of complainants to the separate answers of the defendants having been heretofore submitted to the court, and the court being now fully ad-
94 vised in the premises, it is ordered that the exceptions for impertinence to the answer of the defendant, The Washington University, be and the same are hereby overruled; and thereupon said complainants, with the leave of court, withdraw their remaining exceptions for insufficiency to the said separate answers of the defendants in this cause.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this cause on Friday, the seventh day of April, in said year, to wit:

Replications to answers filed, & time for taking testimony extended.

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., complainants, *ag'st* THE WASHINGTON UNIVERSITY ET AL., defendants. } In chancery.

This day come the complainants, by their solicitors, and file their replications to the separate answers of the defendants herein. And on

the motion of said solicitors for the complainants, it is ordered that the time for taking testimony, to be used upon the hearing of this cause, be extended, in favor of both parties, for the period of ninety days
95 from this date, and it is further ordered that this cause be now continued until the next term of this court.

The replication to the separate answer to the defendant, The Washington University, is in the words and figures following, to wit:

Replication to the separate answer of the defendant, The Washington University.

GEORGE B. FINCH, ASSIGNEE, ET AL.,
vs.
WASHINGTON UNIVERSITY ET AL.

In the circuit court of the United States for the Missouri districts.

Replication of complainants to the answer of the Washington University, one of the defendants.

The repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto say, that they will aver and prove their said bill to be true, certain, and sufficient in law to be answered unto; and that the said answer of the said defendant is uncertain and untrue, and is insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, con-
96 fessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by their said bill they have already prayed.

DAVIS, THOROUGHMAN & JONES,
Plaintiffs' Solicitors.

The replication of the separate answer to the defendant, Seth A. Ranlett, is in the words and figures following, to wit:

Replication to the separate answer of the defendant, Seth A. Ranlett.

In the circuit court of the United States for the Missouri districts.

GEORGE B. FINCH ET AL.
vs.
WASHINGTON UNIVERSITY ET AL.

Replication of complainants to the answer of Seth A. Ranlett, one of the defendants.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say, that they will aver and prove their said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain
97 and untrue, and is insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever,

in the said answer contained, material or effectual in the law to be replied to, confessed and avoided, traversed or denied, is true. All which matter' and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly as in and by their said bill they have already prayed.

DAVIS, THOROUGHMAN & JONES,
Solicitors for Complainants.

And afterwards at the October term of said circuit court, A. D. 1871, the following proceedings were had in this cause on Saturday, the twenty-first day of October, in said last-mentioned year, to wit:

Agreed statement of facts filed.

GEORGE B. FINCH, ASSIGNEE OF JAMES J. Daly, a bankrupt, and Edward R. Chambers, plaintiffs,
vs.
THE WASHINGTON UNIVERSITY AND SETH A. Ranlett, defendants.

This day came the parties, by their respective solicitors, and file a statement of the facts, agreed upon at the hearing of this cause.

Final decree.

And this cause having come on to be heard upon the bill, an-
98 swer, replications, exhibits, proofs, and stipulations of the parties; and the same having been duly argued by counsel for complainants and defendants; and the court being fully advised in the premises, doth order, adjudge, and decree that the sale of the land on the ninth day of December, in the year eighteen hundred and sixty-two, by Seth A. Ranlett, as trustee, mentioned in the pleadings herein to the Washington University, and the deed thereof to the Washington University by the said Seth A. Ranlett, trustee of said lands, were null and void, as against the complainants; and that the said Washington University acquired no title to said land as against the complainants; and that the purchase by the said Washington University of the said land was as trustee and in trust for the uses and purposes mentioned in the deed of trust in the pleadings herein mentioned; and the court doth further order, adjudge, and decree, that the sale of said land by said Washington University on the first day of August, in the year eighteen hundred and sixty-seven, to the parties mentioned in the
99 pleadings herein, was made by said Washington University, as trustee and in trust for the uses and purposes mentioned in the deed of trust in the pleadings herein and for no other purpose, and that the sum of sixteen thousand two hundred and thirty dollars, received by said Washington University from the sale of said land to the parties in the pleadings herein mentioned, was received by said Washington University, as trustee and in trust for the uses and purposes mentioned in the deed of trust in the pleadings herein mentioned, and for no other purpose; and the court doth further order, adjudge, and decree, that the said Washington University retain out of the said sum of sixteen thousand two hundred and thirty dollars the sum of eleven thousand two hundred and eighty-two dollars, which is the amount of principle and interest which was due and owing upon the

notes secured by the deed of trust in the pleadings herein mentioned, on the first day of August, eighteen hundred and sixty-seven, the day of sale by said Washington University, and that said Washington University further retain the sum of four hundred dollars, being amount of taxes paid on said lands for the years 1861, 1862, 1863, 1864,
100 1865, 1866, 1867; and that the said notes, secured by said trust deed, be and are cancelled; and the court doth further order, adjudge, and decree, that the said Washington University pay to the complainants the sum of five thousand four hundred and sixteen dollars, being the amount, principle, & interest, which remains due and owing to said complainants, after the deductions above specified; and that the Washington University pay the costs of this suit, and that execution be issued therefor.

The agreed statement of the facts in this cause referred to in the last preceeding order, and filed, as aforesaid, is in the words and figures following, to wit:

Agreed statement of facts.

GEORGE B. FINCH AND OTHERS, COMPLAINANTS,
vs.
THE WASHINGTON UNIVERSITY ET AL.

At a hearing of this cause the respective parties agreed upon the following statement of facts and stipulated that the same should be heard and considered by the court, to wit:

First. That George B. Finch, one of the complainants, was duly appointed assignee in bankruptcy of James J. Daly at the time and as stated in the complainants' said bill, and is a resident of Vir-
101 ginia, as alleged.

Second. That James J. Daly and Edward R. Chambers, on the 24th day of March, 1860, at the time they purchased the real estate described in the complainant's bill, were residents of the State of Virginia and of the county of Mecklenburg', in said State, and that they have ever since continued to reside in said State and county, as alleged; and that they executed the notes and deed of trust, as stated in the bill.

Third. That the deed of trust executed by them to the defendant, Seth A. Ranlett, and the other deed, made exhibits to the complainant's bill, may be read to the court without further proofs.

Fourth. That said Seth A. Ranlett accepted said trust under said deed, and sold the said real estate on the 9th day of December, in the year 1862, to Washington University, one of the defendants, as shown by the deed of that date made by said Ranlett, which deed may be read to the court without further proof.

Fifth. That of the notes of said Daily and Chambers, mentioned in the complainant's bill, four remained unpaid at the time said Ran-
102 lett advertised said real estate for sale, under the power in said deed of trust, to wit: One note for $240, made payable September 24th, 1861; one for $240, made payable March 24th, 1862; one for $4,000, made payable March 24th, 1862; and one for $120, made payable September 24th, 1862.

Sixth. That Washington University is a corporation, incorporated long prior to the year 1860 by the general assembly of the State of Missouri, which corporation was incorporated for educational purposes exclusively, having neither capital or stock; that Seth A. Ranlett, at the

time he accepted said trust and made said sale under said deed of trust, was one of the directors of said university, and also the secretary of the board of directors, and that he had no interest in said property at the time of said sale; that said university, under its charter, is authorized to take and hold real and personal property by purchase, devise, or gift, and to sell and dispose of its property, real and personal, at pleasure; that said university became the holder of the notes made by said Daily and Chambers, and mentioned in complainant's bill, within one
103 month after the said notes were made, and that said university was the holder of all of the said notes which remained unpaid at the time of the said trustee's sale, made by said Ranlett, and said university is now such holder of said notes.

Seventh. That said university, on the first day of August, A. D. 1867, sold and conveyed the same property it claimed by said deed of said Seth A. Ranlett to the parties stated in complainant's bill for the sum of $16,230.

And it is further stipulated and agreed that, if the court on this hearing shall decree against said Washington University, and order it to account to the complainants in respect to the matter of complaint in said bill, the sum for which said university shall account shall be five thousand four hundred and sixteen dollars, ($5,416$.)

Lastly. That this stipulation and agreement shall be entered of record with the decree of the court. It is further admitted that said Daily and Chambers made the different payments of the notes as stated in the bill.

JOHN E. JONES,
Complainants' Solicitor.
KRUM & DECKER,
Solicitors for Defendants.

104 And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in this cause on Wednesday, the first day of November, in said year, to wit:

Appeal granted, bond approved, & supersedeas granted.

GEORGE B. FINCH, ASSIGNEE, &C., ET AL., plaintiffs,
vs.
THE WASHINGTON UNIVERSITY ET AL. } In chancery.

This day come the defendants, by their solicitors, and pray an appeal from the decree heretofore entered in this cause by this court to the Supreme Court of the United States, which is allowed, and said appeal granted.

And thereupon said defendants present to the court their bond of appeal herein, signed by said defendant, The Washington University, by its president, William G. Eliot, as principal, and Wayman Crow and James Smith, as sureties, which bond is approved by the court and ordered to be made part of the record herein.

And thereupon it is ordered that a supersedeas be granted, staying all further proceedings upon the decree heretofore entered herein.

105 The bond of appeal referred to in the last preceeding order, and filed as aforesaid, is in the words and figures following, to wit:

Bond of appeal.

Know all men by these presents that we, Washington University, by W'm G. Eliot, its president, Wayman Crow & James Smith, *secretaries*, are held and firmly bound unto George B. Finch, assignee of James J. Daily and Edward R. Chambers, in the full and just sum of twelve thousand dollars, to be paid to the said George B. Finch, assignee, and said Edward R. Chambers, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this first day of October, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas, lately, at the October term of the circuit court of the United States for the districts of Missouri, in a suit depending in said court between the said George B. Finch, assignee, and Edward R. Chambers, complainants, and said Washington University and Seth A. Ranlet,
106 defendants in equity, judgment or decree was rendered against the said Washington University, ordering & decreeing that said university shall pay to said complainants the sum of fifty-four hundred and sixteen dollars & cents and costs of said suit; and the said Washington University, having prayed an appeal to the Supreme Court of the United States to reverse the judgment or decree in the aforesaid suit, and a citation directed to the said complainants having been duly served on them, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Washington University shall prosecute said appeal to effect, pay the said sum of $5,416 , decreed to be paid as aforesaid, and answer all damages and costs, if it fail to make good said appeal, then the above obligation to be void; else to remain in full force and virtue.

W. G. ELIOT,
Pres't of Washington University. [SEAL.]
WAYMAN CROW. [SEAL.]
JAMES SMITH. [SEAL.]

Sealed and delivered in presence of—
Approved by Arnold Krekel, judge.

107 PLAINTIFF'S TESTIMONY.

Deposition of Robert Bryson.

Testimony on part of plaintiff.

Deposition of Robert Bryson, taken before C. N. Williams, notary public within and for the county of Mecklenburg, & State of Virginia.

Interrogatories propounded in writing on the part of plaintiff.

1st. Are you acquainted with George B. Finch and Edward R. Chambers, parties plaintiff to this suit?
Answer. I am.
2nd. Where do they reside?

Answer. In the town of Boydton, county of Mecklenburg, & State of Virginia.

3rd. Were you acquainted with James J. Daly?

Answer. I was.

4th. Where did James J. Daly & Edward R. Chambers reside during the years 1861, 1862, 1863, 1864, 1865?

Answer. In the town of Boydton, county of Mecklenburg, & State of Virginia.

5th. How long have you known James J. Daly and Edward R. Chambers?

Answer. I have known them both for upwards of thirty years.

6th. Where did they reside during the time that you have known them?

108 Answer. In the town of Boydton, county of Mecklenburg, & State of Virginia.

7th. What is the age of Edward R. Chambers, and what would be the age of James J. Daly, if living?

Answer. E. R. Chambers is between seventy and eighty years of age, I judge, and James J. Daly, I should judge, was between fifty and sixty years of age when he died.

Cross-interrogatories propounded on the part of the defendants:

Inter'ogatory first. If, in answer to any question propounded to you by complainants, you state the place where James J. Daly and Edward R. Chambers, or either of them, resided during the years 1861, 1862, 1863, 1864, and 1865, please state your means of knowledge, and how you know the fact or facts of which you testify.

Answer. I have been a resident of the county of Mecklenburg, State of Virginia, for forty years, and of the town of Boydton for sixteen years, and have seen E. R. Chambers and J. J. Daly, up to the time of his death, almost every day.

Inter'ogatory second. State your own age, your own place of
109 residence, and state how and where you yourself were employed during each of the years 1861, 1862, 1863, 1864, & 1865.

Answer. I am fifty-four years of age; reside in the town of Boydton, county of Mecklenburg, & State of Virginia; am a merchant, and was employed as such in said town and county during each of the years 1861, 1862, 1863, 1864, & 1865.

Inter'ogatory third. State the business or employment of said James J. Daly and Edward R. Chambers, during the years 1861, 1862, 1863, & 1864; and also state when and how they and each of them were employed during said last-mentioned years.

Answer. They were attorneys at law during each of these years, and resided and practised their profession in the town of Boydton, county of Mecklenburg, & State of Virginia, during each of the said last-mentioned years.

ROB'T BRYSON.

Deposition of B. D. Cogbill.

Deposition of B. D. Cogbill, taken before C. N. Williams, no-
110 tary public within and for the county of Mecklenburg, and State of Virginia.

And the said B. D. COGBILL, being of lawful age and sound mind, and being first carefully examined, cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth touching the

matters in controversy in said civil cause, deposes and says: That he is fifty-seven years of age, and has been a resident of the county of Mecklenburg, in the State of Virginia, for twenty-five years, and is well acquainted with the plaintiffs, George B. Finch, Edward R. Chambers, and James J. Daly, and knows that the said Edward R. Chambers is now and has been a resident of the county and State aforesaid since the year 1844, and that James J. Daly had been a resident of the county and State aforesaid since the year 1844, up to the time of his death, which occurred in the summer of 1870, and that the said George B. Finch is now and has been a resident of the county and State aforesaid since January, 1866. And further this deponent saith not.

B. D. COGBILL.

111 *Deposition of James B. Dugger.*

Deposition of James B. Dugger, taken before C. N. Williams, notary public within and for the county of Mecklenburg and State of Virginia.

Inter'ogatories propounded in writing on the part of plaintiff.

1st. Are you acquainted with George B. Finch and Edward R. Chambers, parties plaintiff to this suit?

Answer. I am.

2nd. Where do they reside?

Answer. In the town of Boydton, county of Mecklenburg, & State of Virginia.

3d. Were you acquainted with James J. Daly?

Answer. I was.

4th. Where did James J. Daly and Edward R. Chambers reside during the years 1861, 1862, 1863, 1864, & 1865?

Answer. In the town of Boydton, county of Mecklenburg, and State of Virginia.

5th. How long have you known James J. Daly and Edward R. Chambers?

Answer. I have known them both for upwards of forty (40) years.

6th. Where did they reside during the time that you have known them?

112 Answer. In the county of Mecklenburg and State of Virginia.

7th. What is the age of Edward R. Chambers, and what would be the age of James J. Daly, if living?

Answer. E. R. Chambers is between (75) seventy-five and (80) eighty years of age. James J. Daly would have been about (58) fifty-eight years of age, if living. We were boys together.

Cross-inter'ogatories propounded on the part of the defendants:

Inter'ogatory first. If in answer to any question propounded to you by complainants, you state the place where James J. Daly and Edward R. Chambers, or either of them resided during the years 1861, 1862, 1863, 1864, and 1865, please state your means of knowledge, and how you know the fact or facts of which you testify.

Answer. I have been a resident of the county of Mecklenburg for forty-seven (47) years, and for thirty-five years have lived in the town of Boydton, and have seen E. R. Chambers & Jas. J. Daly, up

113 to the time of Daly's death, which occur'ed in the spring of 1870, almost every day.

Inter'ogatory second. State your own age, your own place of residence, and state how and where you yourself were employed during each of the years, 1861, 1862, 1863, 1864, and 1865.

Answer. I am sixty years of age; reside in the town of Boydton, county of Mecklenburg, Va.; am a merchant tailor, and was employed as such during each of the years, 1861, 1862, 1863, 1864, & 1865.

Inter'ogatory third. State the business or employment of said James J. Daly and Edward R. Chambers, during the years 1861, 1862, 1863, & 1864, and also state when & how, they and each of them, were employed during said last-mentioned years.

Answer. They were attorneys at law, during all this time, & lived & practiced their profession in the town of Boydton, county of Mecklenburg, & State of Virginia, during the said last-mentioned years.

JAMES B. DUGGER.

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115 *Deposition of R. F. Clack.*

Deposition of R. F. Clack, taken before C. N. Williams, notary public within and for the county of Mecklenberg, and State of Virginia:

And the said R. F. CLACK, being of lawful age and sound mind, and being first carefully examined, cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters in controversy in said civil cause, deposes and says:

That he is forty-three years of age, and has been a resident of the county of Mecklenburg, in the State of Virginia for thirty years, and is well acquainted with the plaintiffs, George B. Finch, E. R. Chambers, and J. J. Daly, and knows that the said E. R. Chambers is now, and has been, a resident of the county and State aforesaid, since the year 1847; and that J. J. Daly had been a resident of the county and State aforesaid since the year 1847 up to the time of his death, which occurred in the summer of 1870; and that the said George B. Finch is now,
116 and has been, a resident of the county and State aforesaid since January, 1866. And further this deponent saith not.

R. F. CLACK,
Late Clerk Mecklenburg Circuit Court.

117 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of George B. Finch, assignee, et al., plaintiffs, against the Washington University et al., defendants, as fully as the same remain' on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said districts, this twenty-seventh day of November, in the year of our Lord eighteen hundred and seventy-one.

[SEAL.]

AUSTIN DRAKE,
Clerk of said Court.

JOHN M. KRUM,
Solicitor for Appellant.

(Indorsed:) United States circuit court, districts of Missouri. George B. Finch, assignee, et al., against The Washington University et al. Duly certified transcript of the record & proceedings in the above-entitled cause. John M. Krum, solicitor for appellant.

(Indorsement on cover:) No. 564. The Washington University, (of Missouri,) appellant, vs. George B. Finch, assignee, of James J. Daily, bankrupt, & Edward R. Chambers. Missouri C. C. U. S. Filed 22d December, 1871.